IN THE SUPREME COURT OF FLORIDA

J. PATRICK SWETT,

Petitioner,

v. CASE NO. SC01-1

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 THE CASE AND FACTS

Petitioner was charged with first degree murder, armed robbery, armed burglary, and aggravated assault. Petitioner had entered a dwelling with the intent to rob the victim. During the ensuing altercation, Petitioner fired one shot from his semi-automatic pistol into the chest of the victim, causing the victim's death. Petitioner then pointed the pistol at another occupant of the residence and ordered her to remove the victim's wallet and turn over the currency. The proceeds of the robbery were split with Petitioner's codefendant. (R2 120-122)

Pursuant to plea negotiations the State agreed to allow Petitioner to plea to the lesser included offense of second degree murder together with the other counts as charged. It was further agreed that Petitioner would be sentenced within the range of 35-55 years and that the sentence imposed would be greater than that given to codefendant Midkiff. (R2 116-117, R3 323-324)

The trial judge accepted the plea agreement both orally and in writing by affixing his signature to the written plea. (R2 122-123, R3 324) At no time did the trial court inform either the State or Petitioner that the sentence range was merely a recommendation. The trial court did not reserve its right to render a sentence outside the agreed-upon range.

Sentencing occurred on December 18, 1998. Petitioner presented eleven witnesses at the original sentencing hearing. Expert medical witnesses testified that Petitioner ("Swett") was prescribed psychotropic medication at the time of the crime and that Swett was well-mannered and gentle. He was the type of person who "reached out" to help others. At the time of the crime Swett was psychotic in that he was manic, paranoid, and mentally impaired. (R2 189-191, 200, R3 237-260)

Two teachers who had formerly taught or worked with Swett testified that Swett was never cruel, that he wrote from jail expressing remorse, that he was an asset to other students, a helper, and he attended church on Sundays. (R3 202-204, 206-208) A Seminole County deputy and a program coordinator for youthful offenders in Orange County testified that Swett had a strong family value system, that he was an exception to the rule in the Orange County Correctional System, and that Swett helped others in the GED program. (R3 209-212, 215-217)

Finally, several family members testified that they were proud of Swett, that he helped others (R3 223-224); that Swett was a great boy scout and lifeguard, that he always helped kids, that he was good in sports and a gifted writer (R3 226-228); also, it was learned that Swett was adopted at the age of eleven months and that he was on the drug ritalin from age seven

through twelve, and that he was "Baker" acted in high school because of suicide concerns. (R3 277-282) The evidence adduced by the defense basically illustrated that Petitioner was a juvenile suffering from drug use, abuse, and mental illness. Petitioner was prescribed medication for his psychosis but had stopped taking the medication. (R3 311-312)

During the sentencing hearing the defense requested a split sentence which would allegedly satisfy the spirit of the plea agreement but substantially reduce Petitioner's incarceration below the 35-55 year range. The State objected stating that the plea agreement was based upon the "*quid pro quo*" of 35-55 years of incarceration in exchange for the reduction of the first degree murder charge. (R3 315-316) The State was especially adamant because Petitioner was the "triggerman" in the killing. (Id.)

The trial court then inquired if it was the

> ...State's position [that] a split sentence would violate at least the spirit of the agreement between the state and the defense ***and the court***?
>
> [STATE]: It would violate more than the spirit, it would be a violation of the agreement because the *quid pro quo*. [The defense attorney] and I discussed that and I wouldn't do it. So the agreement was entered fully on the

> record with that proviso, and I don't think that that would be appropriate.

(R3 316-317)(emphasis supplied) The trial court then sentenced Petitioner to 38.5 years incarceration. In accordance with the plea agreement, Petitioner's sentence was six months longer than that of the codefendant. (R3 319-320) Both defendants received 15 years of consecutive probation.

After affirmance on direct appeal and within the sixty-day period provided by Fla. R. Crim. P. 3.800(c), Petitioner filed a motion to modify the sentence seeking mitigation of the incarcerative period. (R3 330) Petitioner alleged in paragraph 4 of the motion that "[t]he plea agreement did not require the defendant to waive his right to seek modification of his sentence." (R3 331)

The motion to mitigate listed ten points, labeled a through j, in support of mitigation. (R3 330-332) Only two of those points, f and h, arguably raised matters which had surfaced subsequent to the original sentencing. Said claims alleged that Swett has conducted himself appropriately while in prison and that he is committed to bettering himself and others. (R3 331)

A hearing was held on the motion and the defense called seven witnesses – five of whom had testified at the original

sentencing hearing. In addition to those five witnesses, Heather Cook (Swett's sister) testified that she has had a little contact with Swett since he has been incarcerated and that he has matured and become more emotionally stable. (R134-35) And Maureen Bravo, who has known Swett since he was in the third grade, testified regarding her knowledge of Swett prior to the time of the original sentencing. (R1 20) She also stated that she has corresponded in writing with Swett after he was sent to prison. (R1 20) She testified that she has noticed a great deal of maturity and remorse in Swett's mannerism. (R1 21)

After the taking of testimony and evidence, the State objected to any modification of the plea agreement, stating:

> First of all, why are we even having this proceeding today? At the time that Mr. Swett entered a plea and was ultimately sentenced, he entered into a *quid pro quo* bargain. That is – and as he's certainly agreed occurred in this case, in exchange for giving up the first-degree murder charge, in exchange for giving up a life sentence without the possibility of parole. The State has given something up. He has already undertaken a sentence that has benefitted him.
>
> * * * * * * * * * * *
>
> From a review of the record, it appears that this proceeding is simply a rehash of last year's

> sentencing. ***It also appears that this is an attempt to make an end run around a plea bargain***.

(R1 86, 89)(emphasis supplied) The State also pointed out that if the sentence were modified downward, another violation of the plea agreement would occur: Petitioner would not receive a sentence greater than that of the codefendant. (R1 90)

The trial court reduced Petitioner's term of incarceration by 17.5 years. The State inquired as to whether the twenty-one year sentence was a downward departure and, if so, whether the record would indicate the basis for the downward departure. (R1 111) The trial court responded in the affirmative and the State recited its objection to the downward departure:

> Just for the record, of course, objection to the modification, number one, and the departure, number two.

(R1 113) The State timely filed a notice of appeal raising the modification and downward departure sentence.

On appeal the Fifth District Court of Appeal reversed the sentence modification. It found that the new sentence was a downward departure and that the trial court violated the plea agreement.

SUMMARY OF ARGUMENT

A downward departure sentence is appealable by the State. Moreover, because a defendant may appeal the violation of a plea agreement, the State must necessarily be permitted to argue and raise plea bargain issues. When Petitioner entered into the plea bargain, he agreed to abide by the terms of the agreement and accept the trial court's decision – as long as the sentence was within the parameters of the plea bargain. Any motion to modify the terms of the agreement should be treated as a motion to withdraw the plea. The parties would then be able to formulate a new agreement or start over from square one. The District Court's opinion is appropriate and should be affirmed.

ISSUE ONE

THE STATE OBJECTED TO THE DOWNWARD DEPARTURE SENTENCE AND THE TRIAL COURT VIOLATED THE PLEA BARGAIN. THIS CAUSE WAS PROPERLY REVIEWED BY THE DISTRICT COURT.

Extensive plea negotiations were conducted in this case. Petitioner was originally charged with first degree murder and there is no dispute that overwhelming evidence of felony murder existed. However, in consideration of several mitigating factors and in exchange for Petitioner agreeing to be sentenced to 35-55 years in prison, the State reduced the charge and entered into a plea agreement with Petitioner. The trial court would not have had the authority or discretion to impose a term of years without a reduction of the original charge.

An extensive and exhaustive sentencing hearing was conducted which resulted in a 38.5 year incarcerative sentence. In further accord with the plea agreement which was accepted by and signed by the trial court, Swett received a sentence which was longer than that given to his codefendant. On appeal, the District Court affirmed the judgment and sentence.

Swett then moved to mitigate his sentence pursuant to Florida Rule of Criminal Procedure 3.800(c). It is clear from the record that the motion raised little, if any, new matters which were not considered during the original sentencing

hearing. The State objected to the mitigation and to the downward departure. The trial court nevertheless reduced Swett's sentence by 17.5 years and resentenced him to 21 years incarceration.

Florida Rule of Appellate Procedure 9.140(c) permits the State to appeal unlawful or illegal sentences, a sentence outside the range permitted or recommended by the sentencing guidelines, or as otherwise permitted by general law. Section 924.07(i), Florida Statutes (2001) allows the State to appeal a sentence imposed below the lowest permissible sentence established by the Criminal Punishment Code.

Finally, where a plea is part of a *quid pro quo* whereby the State has agreed to drop or reduce a charge, the State is entitled to insist on adherence to the terms of the plea agreement or be accorded the opportunity to void the plea. See Jolly v. State, 392 So.2d 54 (Fla. 5th DCA 1981). Clearly, the plea bargain was a contract between all parties redressable by general law.

A defendant who knowingly accepts the benefit of a plea bargain cannot thereafter disavow that bargain, any more than a party to a contract can accept the benefit of that contract and then refuse to perform his obligations thereunder. As stated by the Court in Scott v. State, 465 So.2d 1359 (Fla. 5th DCA 1985),

a defendant is not entitled to negotiate a plea, accept its benefit, and then ask the trial or appellate court to grant him a ***better deal*** than the one agreed to by the state. A defendant is bound by his own plea bargain. See also Mann v. State, 622 So.2d 595 (Fla. 3rd DCA 1993) (defendant who accepts the benefit of a plea agreement cannot be allowed to disavow the agreement); Jolly v. State, 392 So.2d 54 (Fla. 5th DCA 1981) (to allow a defendant to receive the benefit of his bargain and deny the state what it bargained for is improper); State v. Jordan, 630 So.2d 1171, 1172 (Fla. 5th DCA 1993).

In this case the district court noted that the downward departure itself was not the appellate issue; rather, the issue was whether the trial court has the discretionary authority to modify a plea agreement entered into by the parties and accepted by the trial court. This Court has held that when a trial court elects to impose a sentence which exceeds the range provided in a plea agreement, it must offer the defendant the right to withdraw his plea. See Goins v. State, 672 So.2d 30 (Fla. 1996). The State is entitled to the same treatment.

Regardless of the issue considered by the district court, the fact remains that "[i]n all proceedings, a court shall have such jurisdiction as may be necessary for a complete determination of the cause." See Florida Rule of Appellate

Procedure 9.040(a); Lopez v. State, 638 So.2d 931, 932 (Fla. 1994). Similarly, "the court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled." See Florida Rule of Appellate Procedure 9.140(h). Therefore, this Court may review the downward departure as well as the violation of the plea agreement and the abuse of discretion below.

If the granting of a motion to modify or mitigate a sentence is purely discretionary in plea bargain cases, then what is the recourse when the trial court abuses its discretion? If a trial court may dishonor any previous plea agreement and abuse its discretion without appellate review, there is little incentive for the State to enter into any plea bargain. The trial court's abuse of discretion is a departure from the essential requirements of law. In fact, as noted in Morrow v. State, 26 Fla. L. Weekly D2586 (Fla. 2d DCA October 31, 2001) the appellate court may treat an appeal of a Rule 3.800(c) motion as a petition for writ of certiorari.

The trial court violated the contract between itself and the parties. General law, public policy, certiorari, and the downward departure each provide an avenue which permits appellate review in this cause. Once jurisdiction is

established, this Court has the power of plenary review to decide any issue in the case regardless of whether said issue was formally addressed in the district court.

ISSUE 2

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED THE PLEA AGREEMENT WHEN IT UNILATERALLY MODIFIED THE SENTENCE.

This Court has adopted the position that a defendant has an absolute right to withdraw his plea if the trial court intends to impose a sentence which exceeds the parameters of the plea agreement. See State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1999), approved, 762 So.2d 507 (Fla. 2000). The State contends that a Rule 3.800(c) motion to mitigate or modify the terms of a plea agreement, or, as described by the State below, an attempt to make an "end run" around a plea bargain, is tantamount to a motion to withdraw plea; it voids the plea agreement and should also permit the State to withdraw therefrom.

Of course, it is Petitioner's contention that the trial court fulfilled its obligation under the plea agreement and then later simply modified the sentence. However, Swett forgets that the plea bargain was between the trial court, the State, and the victims. During the Rule 3.800(c) hearing below, members of the victim's family testified that they thought they had closure and a "plea agreement." (R1 63-66, 73) Thus, the trial court also violated the plea agreement in relation to victim rights and impact. See State v. Warner, 762 So.2d 507, 514 (Fla.

2000)(victim input must be at a meaningful time, not after the trial court had already determined a sentence).

The district court's written opinion revolved upon whether this was a violation of the plea agreement and a downward departure; thus it really does not matter whether the issue is raised in a Rule 3.800 motion, a Rule 3.850 motion, or on direct appeal. This Court is not merely faced with a simple discretionary mitigation; there are factual and legal findings as outlined below. The combination of factual and legal findings result in a *de novo* scope of review.

Factually, it was found that this case involved an "end-run" around the plea bargain. Evidence offered in mitigation during the Rule 3.800 hearing was nearly identical to that offered during the original sentencing hearing. Moreover, the trial court clearly admitted that it was "bothered" by the original plea bargain. (R3 106-107) The court was "bothered" because the case did not go to trial; and it was "bothered" because of the extensive factors in mitigation which were presented to the trial court only after the plea had been negotiated. (Id.) The trial court stated it was so "uncomfortable with the situation" that it offered to allow Swett to withdraw his plea and go to trial – an offer which was declined. (R3 108)

The trial court then ruled on the motion to mitigate:

> Now, we're coming back and we're within the jurisdiction of the court, I feel very soundly so – perhaps I'll be reversed, I don't know – to rehear this issue.

(R3 109) Essentially, the trial court was taking advantage of a second opportunity to reduce the sentence in spite of the existing plea agreement. And, ostensibly, the State would not be able to appeal the trial court's "end run."

The mitigation or modification was never based upon conduct or events occurring subsequent to the original sentence. The reduced or mitigated sentence was strictly based upon the trial court's previous unilateral determination that the plea bargain was too harsh:

> ...I'm going to reduce that sentence based on the factors contained in [Swett]'s motion, which were – ***the court previously couldn't consider those because of the original plea bargain***...
>
> * * * * * * *
>
> I'm also going to do it because I do believe there's been some competent evidence presented, ***both at the sentencing hearing***, which, for the record, was after the plea agreement had been entered, but before sentencing, and evidence has been furnished here today, ***although today wasn't nearly as substantive...as what we had the first time.***

(R1 109, emphasis supplied) Clearly, then, the trial court received evidence it was not able to consider under the plea agreement, and then it used said evidence to fashion a new sentence that was less "bothersome" and "uncomfortable." The trial court acted over the objections of the State and the victim's family. Moreover, the trial court knew at the original sentencing that it was uncomfortable and bothered by the terms of the agreement but never once informed the State of any misgivings. Had the trial court been more candid with the State a different result would have been reached.

Swett misinforms this Court that the State has never before made the argument that the evidence does not support mitigation. (Swett's brief on the merits at 14) In the jurisdiction brief and in the oral argument below, the State has always maintained that little or no new evidence was presented at the Rule 3.800(c) hearing. The evidence which supports mitigation was presented to the trial court and resulted in a very lenient sentence under the terms of the plea bargain. Subsequently, a few letters and one or two limited observations by family members is not a sufficient basis to reduce a prison sentence by 17.5 years.

The district court did not create a new exception to Rule 3.800(c). It merely enforced well-established law. A defendant

cannot be allowed to arrange a plea bargain, back out of his part of the bargain, and insist that the State uphold its end of the agreement. See Brown v. State, 367 So.2d 616 (Fla. 1979). When an agreement with the defendant has not been fulfilled, the defendant is entitled to specific performance of the unfulfilled promise or to withdrawal of the plea. See Santobello v. New York, 404 U.S. 257, 263, 92 S.Ct.495, 499, 30 L.Ed.2d 427 (1971). Conversely, the State is entitled to specific performance or to reinstate the first degree murder charge.

Swett suggests that it was the State's burden to insist, as a condition of the plea bargain, that Swett not file a Rule 3.800(c) motion. The State counters that if Swett did *not* want a sentence between 35 and 55 years, he should not have entered into the plea bargain. Swett pled to a specific sentencing range. His agreement was to accept a sentence within that range and his very act of pleading to the bargain entailed a waiver of a lesser sentence. A motion to amend, modify, or mitigate a plea bargained sentence must be treated as a motion to withdraw plea or, at the very least, should open a dialogue between all parties of the contract.

Contrary to Swett's argument, the district court's opinion does not directly and expressly conflict with Sanchez v. State, 524 So.2d 704 (Fla. 4th DCA 1988), affirmed, 541 So.2d 1140 (Fla.

1989). In fact, not only does Sanchez stand as precedent permitting the appeal of a Rule 3.800 motion, it involves only the early termination of probation and the withholding of a former adjudication of guilt. There is no discussion whether the original plea agreement mandated adjudication, and no indication whether the State vehemently objected to any modification as it clearly did in this case.

Again, State v. Cure, 760 So.2d 243 (Fla. 3d DCA 2000) relied upon by Petitioner and discussed by the district court, supports the argument that a violation of the plea agreement is appealable by the State. Nevertheless, Cure's plea agreement involved a sentence to boot camp with the understanding that if he violated the terms of boot camp he would receive 21-36 months in state prison. Upon violation of boot camp rules the trial court resentenced the juvenile to mere probation. The State appealed, as it did in this case, claiming violation of the plea agreement. The court held that the State could not interfere with the trial court's future "violation of boot camp" discretion. However, as noted by the district court below, no *quid pro quo* for the plea agreement was ever established in the Cure case.

This Court has the power of plenary review over all aspects of this case. The facts below clearly indicate that the trial

court and Swett effected an “end run” around the plea agreement. The rights of the State and of the victim’s family have been trampled by the trial court’s outspoken “discomfort” with the original plea agreement. It is likely that the trial court suggested that Swett file a motion to mitigate; and it was generally assumed that the State might not even be able to appeal the 17.5 year reduction of sentence. This Court should uphold the original plea bargain and affirm the district court. In the alternative, the State should be permitted to withdraw from the plea agreement and reinstate the original charges.

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court approve the decision of the district court below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing initial brief in case number SC01-01 has been furnished by U.S. Mail to Donald R. West, Esq., 626 West Yale Street, Orlando, FL 32804 and Terrence E. Kehoe, Esq., 18 West Pine Street, Orlando, FL 32801 this _____day of November, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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