IN THE SUPREME COURT OF FLORIDA

J. PATRICK SWETT

Petitioner,

v. **CASE NO.: SC01-1**

STATE OF FLORIDA,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

MR. SWETT'S REPLY BRIEF ON THE MERITS

TERRENCE E. KEHOE
Florida Bar No. 330868
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (fax)

DONALD R. WEST
Florida Bar No. 315941
626 West Yale Street
Orlando, Florida 32804
407-425-9710
407-425-8287 (fax)

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS
continued

PAGE

TABLE OF CITATIONS

CASES **PAGE**

PRELIMINARY STATEMENT

In this brief, the parties and the record on appeal will be referred to as in Mr. Swett's initial brief. Mr. Swett's initial brief will be referred to as "IB." The state's answer brief will be referred as to "AB."

BASELESS ATTACK ON TRIAL JUDGE MUST BE REJECTED

In any appeal, the trial judge's decision - and the factual basis and legal reasoning behind it - are fair game. However, the state's answer brief sets forth a broad attack on the trial judge, attacking his actions throughout the mitigation process. Most critically, the state has accused the trial judge of judicial misconduct, without any factual basis whatsoever. The state has argued "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 years reduction of sentence" (AB 17). Essentially, the state is accusing the trial court of ex parte contact with Mr. Swett's counsel, in an effort to manipulate and orchestrate the legal process to the benefit of Mr. Swett. This claim cannot simply be considered overzealous advocacy, as it is made to the highest court of this state.[1/] It is preposterous on its face. It has no basis in the record or in fact. The authors of the state's brief owe the trial judge an apology.

1/ This accusation was not made in the trial court or to the Fifth District.

STATEMENT OF THE CASE AND FACTS

Although the facts essential to resolving the legal dispute are not in debate, the state has seen fit to go beyond the facts necessay to this appeal to discuss the underlying offenses in an effort to color this Court's decision (AB 1). The record shows that Mr. Swett, 17 years old and highly intoxicated, attempted with a co-defendant to rob a known drug dealer of drugs and money (1/48-52). Immediately upon Mr. Swett entering the drug dealer's residence, a vicious fight broke out. During it the decedent was shot one time. As Mr. Swett testified at the mitigation hearing:

> Everything went horribly wrong. That was the last thing that was supposed to happen. (1/52).

ARGUMENTS

I. THE FIFTH DISTRICT'S OPINION MUST BE REVERSED BECAUSE THE TRIAL COURT'S DISCRETIONARY ORDER WAS NOT REVIEWABLE

A. Introduction

Essentially the state is asserting that it could seek appellate review in this case in the interests of justice (AB 10). The state cites a number of cases (AB 9-10). Yet none of those cases involves a situation in which a defendant had lawfully filed a Rule 3.800(c) motion to mitigate. None involve an appeal from an order granting a

defendant's motion to mitigate his sentence. Simply asserting that "public policy" (AB 11) provides an avenue of appeal is wrong. That state's right to appeal is a strictly construed creature of statute. It has no such right in this case.

B. Order Granting Motion to Modify Sentence Pursuant to Fla.R.Crim.P. 3.800(c) Was Not Appealable by State

Although this is a critical issue argued by Mr. Swett, the state has chosen not to directly address the arguments and authorities set forth on this issue in Mr. Swett's initial brief (IB 8-10). Simply stated, the state has presented no authority to this Court which gives it the right to appeal an order granting a defendant's Rule 3.800(c) motion. As additional authority for the proposition that the trial court's exercise of discretion in ruling on a motion for mitigation is not subject to review on appeal, see Royal v. State, 736 So.2d 157 (Fla. 3d DCA 1999); Lusskin v. State, 717 So.2d 1076 (Fla. 4th DCA 1998).

C. Order Granting Motion to Modify Sentence Pursuant to Fla.R.Crim.P. 3.800(c) Was Not Appealable as a Downward Departure Sentence

On this point, the state simply asserts that a downward departure sentence is appealable by the state (AB 9). Yet it acknowledges, as the Fifth District noted, that the downward departure was not the appellate issue in this case (AB 10).

The state argues that § 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 (AB 9). Of course, Mr. Swett was not sentenced pursuant to the Criminal Punishment Code, as this was a 1996 offense.

D. Order Granting Motion to Modify Sentence Pursuant to Fla.R.Crim.P. 3.800(c) Not Subject to Review by Certiorari

The state makes an assertion, without any legal argument or support, that certiorari provides an avenue for appellate review (AB 11). It provides no legal authority to support its claim. It cites one case, Morrow v. State, ___ So.2d ___ (Fla. 2d DCA 10/31/01) [26 Fla. L. Weekly D2586], for the proposition that "the appellate court may treat an appeal of a Rule 3.800(c) motion as a petition for writ of certiorari" (AB 11). This is a misreading of Morrow. In Morrow, the Second District simply held that the portion of the trial court's order denying a Rule 3.800(c) motion was non-appealable. Further, because the motion was untimely, the Second District declined to treat Morrow's appeal as a petition for writ of certiorari.

II. ORDER GRANTING MOTION TO MODIFY SENTENCE PURSUANT TO FLA.R.CRIM.P. 3.800(c) CONSTITUTED A PROPER EXERCISE OF A TRIAL COURT'S DISCRETION

The most astonishing thing about the state's answer brief is that it virtually ignores Rule 3.800(c). Rule 3.800(c), in pertinent part, states:

> **Rule 3.800. Correction, Reduction, and Modification of Sentences**
>
> * * *
>
> **(c) Reduction and Modification**. A court may reduce or modify to include any of the provisions of chapter 948, Florida Statutes, a legal sentence imposed by it * * * within 60 days after receipt by the court of a mandate issued by the appellate court on affirmance of the judgment and/or sentence on an original appeal, * * *. This subdivision of the rule shall not, however, be applicable to those cases in which the death sentence is imposed or those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion.

The Fifth District Court of Appeal, and the state, simply want to ignore the express language of this rule.[2/] Because the rule itself did not prohibit the trial court from doing what it did in Mr. Swett's case, the Fifth District and the state have to resort to ignoring the rule, and thereby essentially creating a fourth exception to the rule.

On its face, there is a jurisdictional component to this rule. There is no dispute that Mr. Swett filed his motion timely, thereby satisfying the sixty day requirement. Once that hurdle is met, the rule sets forth three specific situations in which it does not

---

2/ The Fifth District quoted the rule, 772 So.2d at 50, but made no attempt to analyze its language in connection with the facts of this case anywhere in its opinion. The state's answer brief also failed to analyze the rule in connection with this case. It is obviously easier to ignore the rule, than to attempt to reconcile it with the result reached by the Fifth District.

apply. None of those situations was implicated in Mr. Swett's case. Neither the state nor the Fifth District has ever attempted to apply one of those exceptions to Mr. Swett's case. **Therefore, once the motion was timely filed, in a situation other than one which would fall within the three exceptions, the trial court may reduce or modify a legal sentence imposed by it.** The use of the term "may," and the numerous cases discussed in connection with the appealability issue above, make it clear that the trial judge has discretion to modify or reduce a legal sentence. There is no exception for legal sentences imposed pursuant to a plea bargain, be it a quid pro quo bargain or not.

This appeal must be governed by the plain language of Rule 3.800(c). Based upon that language, it is beyond dispute that in Mr. Swett's case the trial court possessed the discretion to reduce Mr. Swett's sentence at the December 13, 1999, hearing. Only by ignoring the language of the rule was the Fifth District able to reach its decision. Only by ignoring the language of the rule can the state attempt to uphold the Fifth District's decision.

A. 1998 Sentence Fully Complied With Plea Recommendation

The state expends a great deal of time and effort in an attempt to show that Mr. Swett is somehow attempting to break the plea agreement. Of course, a plea

agreement is limited to the terms of the agreement itself. The written agreement makes no mention of any waiver of Mr. Swett's right to avail himself of a motion to mitigate under Rule 3.800(c). The oral plea colloquy makes no mention of such a waiver. Mr. Swett acknowledged in the plea document itself and under questioning at the change of plea that the only promises or conditions of the plea were those that were set forth therein. The prosecutor never asserted there were other provisions. Yet it is clear that the state could have made such a waiver a condition of the plea. See e.g., Bland v. State, 526 So.2d 947 (Fla. 5th DCA 1988) (quid pro quo plea agreement whereby defendant pled to one offense and another charge was nol prossed; agreement contained explicit waiver of defendant's right to appeal any lawful sentence that may be imposed), review denied, 534 So.2d 398 (Fla. 1988). See also, Griffin v. State, 798 So.2d 828 (Fla. 3d DCA 2001) (defendant can, and did, waive entitlement to credit for jail time served prior to sentencing); Williams v. State, 757 So.2d 597, 600 (Fla. 5th DCA 2000) (speedy trial issue; if state is concerned about speedy trial, it could merely obtain a waiver from the defendant as part of his substantial assistance agreement).

This same principle - that a plea agreement is limited to the express terms - is applicable to and enforceable against the state. The state is charged with the knowledge that a defendant, post-sentencing, is entitled to file a motion to mitigate

under Rule 3.800(c). It made no effort in the plea to foreclose Mr. Swett from exercising that right. Once Mr. Swett exercised that right, and obtained a mitigated sentence, the state should not then be able to claim that the plea bargain had been violated in any way.

If the Court wishes to analogize a plea situation to a contract, as the state attempts to do throughout its brief, then quite simply waiver of a Rule 3.800(c) motion was a condition which the state could have put into the contract, but did not. It cannot now seek to impose such a condition on Mr. Swett, having foregone its prior opportunity to do so.

In an attempt to further obscure the real issues, the state is now asserting that granting the motion to mitigate has trampled on victim rights (AB 12). That, of course, is simply a red herring thrown in to distract the Court. The victim's relatives were present, testified, and made statements at the motion to mitigate hearing (1/63-74). The trial court recognized and considered that its decision would have an impact on the victim's friends or relatives lives (1/105). In no way were the victim's family and friends shut out of the process.

B. Trial Court Properly Exercised its Discretion

The state apparently believes that the trial court had no discretion in this case. The state asserts that only a couple of the grounds raised in the motion to

mitigate has surfaced subsequent to the original sentencing (AB 4). Not only did the state fail to object or seek to exclude evidence as to the other points down below, and therefore has waived this argument, but more importantly the argument is baseless. In considering a motion to mitigate the trial court is not limited solely to facts which surfaced subsequent to sentencing. In fact, in the usual case the trial court is merely reweighing or reconsidering the same information presented at a sentencing hearing a few weeks before. Most importantly, in Mr. Swett's case the state overlooks the fact that the motion to mitigate hearing took place virtually a year after the initial sentencing. This presented a situation where the trial court could hear extensive evidence of Mr. Swett's improvement since the original sentencing, even though that testimony built on the testimony presented at the original sentencing (IB 3-5).

Citing Scott v. State, 465 So.2d 1359 (Fla. 5th DCA 1985), the state asserts that 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 (AB 9). Scott, of course, does not involve a Rule 3.800(c) motion, and therefore its dicta is inapplicable to Mr. Swett's case. Mr. Swett is not denying his plea. Scott, and the other cases relied upon by the state (AB 9-10) are simply inapplicable because they do not involve a situation were a defendant is pursuing a legal right not waived in a plea agreement - a Rule 3.800(c) motion. If it is not part of the plea bargain then the defendant obviously is not violating the bargain

by pursuing a valid legal avenue.

C. The Fifth District Improperly Created New Exception to Rule 3.800(c)

The state asserts that the Fifth District has not created a new exception to Rule 3.800(c) (AB 15). Yet that is exactly what that court did. A rule of statutory construction applicable to this case is "expressio unius est alterio exclusis" i.e., that which is not included is excluded. This Court has set forth three distinct exceptions to Rule 3.800(c). None applies in this case. The Fifth District cannot create a fourth one. Despite what the state argues, the effect of the Fifth District's decision is to eliminate the application of Rule 3.800(c) in a certain class of cases. It did not possess the power to do that.

D. Analogous Situation - Motion For Early Termination of Probation

The state has ignored this argument. Yet, if this Court accepts the state's argument that a motion to mitigate in a plea agreement case is the functional equivalent of a motion to withdraw a plea, then the next logical step is to consider a motion for early termination of probation in a plea agreement case as a motion to withdraw the plea, and forbid such motions. That would have a serious negative effect on both the plea and probation processes.

E. Fifth District's Reasoning Was Erroneous

The Fifth District essentially found that the motion to mitigation was a evasion of the plea agreement. 772 So.2d at 52. This is essentially the same argument as the state's "end-run argument" discussed above at pages 6-8, supra. The Rule 3.800(c) motion was not an "end-run" around anything. The plea agreement had been enforced by the trial court at the 1998 sentencing. Under the law, Mr. Swett was entitled to pursue a Rule 3.800(c) remedy. Neither the state nor the Fifth District has been able to present any legal authority which precluded Mr. Swett from pursuing that remedy. Instead, their decision seems to simply be "We don't like it so its wrong." That is not the law. Therefore, the Fifth District's decision cannot stand.

Finally, the state now argues that a Rule 3.800(c) motion to mitigate is tantamount to a motion to withdraw a plea; it voids the plea agreement and should permit the state to withdraw from it (AB 12). What is important to note is that the state has not previously argued that a Rule 3.800(c) is equivalent to a motion to withdraw the plea. That argument was not made at the circuit court level, in its initial brief, or at oral argument to the Fifth District, or in its brief on jurisdiction to this Court. Instead, this is simply a new argument thrown out by the state which must be rejected on its face. If a court determines that Mr. Swett was not permitted to file a Rule 3.800(c) motion due to his plea agreement, the remedy is denial of the motion. It is not, and can never be, revocation of the plea.

CONCLUSION

Based on the arguments and authorities set forth in this brief, and in Mr. Swett's initial brief, this Court must vacate the Fifth District's decision and reinstate the trial court's December 13, 1999, order.

Respectfully submitted this 7th day of January, 2002.

TERRENCE E. KEHOE
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (fax)

TERRENCE E. KEHOE
Florida Bar No. 330868

DONALD R. WEST
626 West Yale Street
Orlando, Florida 32804
407-425-9710
407-425-8287 (fax)

DONALD R. WEST
Florida Bar No. 315941

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2002, a true copy of the foregoing was sent by United States mail to Carmen F. Corrente, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118; and the original and 7 copies were sent by United States mail to Thomas D. Hall, Clerk, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927.

DONALD R. WEST
Florida Bar No. 315941

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in 14 point TIMES NEW ROMAN proportional space font.

TERRENCE E. KEHOE
Florida Bar No. 330868