

IN THE SUPREME COURT OF FLORIDA

DWAYNE LAMONT  
HARRELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-2244

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Dwayne Lamont Harrell, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. The record also consists of one supplemental volume, which will be referenced as "SR" and followed by any appropriate page number. "PJB" will designate Petitioner's Jurisdictional Brief. Each symbol will be followed by the appropriate page number in parentheses.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

For the purpose of this answer brief, the State accepts Petitioner's statement of the case and facts as recited in his Petitioner's Brief on the Merits.



SUMMARY OF ARGUMENT

ISSUE I.

The record on appeal does indicate, as the First District found, that Petitioner's argument made on direct appeal was not raised below at the trial level as an issue and thus was not preserved for review of the First District Court.

Secondly, as to the merits of Petitioner's claim, the conduct of the court and the parties was a clear indication that the plea was accepted by the court. Finally, any error was harmless error. Thus, the First District properly affirmed the trial court's denial of Petitioner's motion to withdraw his plea.

ARGUMENT

ISSUE I

DID THE FIRST DISTRICT COURT ERR BY FINDING  
THAT PETITIONER FAILED TO PRESERVE HIS ARGUMENT  
ON APPEAL AND THUS AFFIRMING THE DENIAL OF THE  
MOTION TO WITHDRAW HIS PLEA? (Restated)

Acceptance of Conflict Jurisdiction

Before engaging in a discussion of the merits, it should be noted that the issue of conflict jurisdiction has not been briefed by the State or accepted by this Court. The determination of conflict jurisdiction distills to whether the First District Court's decision reached a result opposite that of Miller v. State, 775 So.2d 394 (Fla. 4th DCA 2000). No such determination has been made by this Court.

Standard of Review

A trial court's determination to deny a defendant's motion to withdraw a plea should be reviewed under an abuse of discretion standard. This Court has stated that

[w]hether a defendant should be permitted to withdraw a previously entered plea of guilty or nolo contendere is a question addressed to the discretion of the trial court.

Watson v. State, 667 So.2d 242, 245 (Fla. 1st DCA 1995).

"Allowing the withdrawal of a guilty plea is within a trial court's discretion; it is not a matter of right." Lopez v. State, 536 So.2d 226, 229 (Fla. 1988); Hunt v. State, 613 So.2d 893, (Fla. 1992).

### Argument

The First District Court properly found that the specific claim brought by Petitioner was not properly preserved for appellate review. Section 924.051, Florida Statutes (2000) provides:

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

(3) An appeal may not 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 judgement 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.

To preserve an issue for appellate review, there must have been a specific objection made in the trial court. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") and Steinhorst v. State, 412 So. 2d 332, 339 (Fla. 1982) ("...in order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for the objection, exception, or motion below").

The defendant bears the burden of showing that an error was properly preserved. Goodwin v. State, 751 So. 2d 537 (Fla. 1999).

Petitioner failed to preserve his current appellate argument as to the grounds for his motion to withdraw the plea. Following the plea colloquy hearing but before his sentencing hearing, Petitioner filed a written motion to withdraw his plea. (I 36). This motion stated that Petitioner's motion should be granted for two reasons: 1) Petitioner believes he is not a habitual offender and 2) Petitioner asserts that he had been threatened and intimidated into entering a plea by the Assistant State Attorney. (I 36). The judge held a hearing **on the grounds that Petitioner raised in his written motion**, heard testimony and denied the motion on the grounds raised. (SR 186). Now on appeal, Petitioner alleges that a plea was never entered in his case because the judge did not formally accept the plea. Clearly, the trial court never had the opportunity to hear or rule upon the Rule 3.172(f) argument now raised in Petitioner's initial brief. Thus, the First District properly found that the current issue was not preserved and thus, not reviewable where there was no claim that the error was fundamental.

This Court should affirm the First District's holding that this issue has not been properly preserved at trial before even reaching the merits. Nevertheless, should this court, whatever the reason may be, find it necessary to reach the

merits of this case, it should affirm the trial court's judgment and sentence for the reasons below.

The rule regarding withdrawals of a plea offer or negotiation is stated in Rule 3.172, Fla. R. Crim. P. The rule, in pertinent part, states that

[n]o plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule. Until that time, it may be withdrawn by either party without any necessary justification.

Id.

Petitioner challenges the denial of his motion to withdraw his plea on the ground that the trial court failed to formally accept his plea. The purpose of the rule governing acceptance of guilty or nolo contendere pleas is to provide a procedure designed to insure that defendant's rights are fully protected when he enters plea to criminal charges. Curry v. State, 671 So.2d 291 (Fla. 5th DCA 1996). This purpose of the rule was met by the extensive plea colloquy which was conducted by the trial court judge. Petitioner's direct appeal argument raises no such issue as to a deprivation of rights. Petitioner's argument does not challenge the lengthy and extensive plea colloquy which the judge conducted. (SR 132-149). Rather, Petitioner's argument raises a technical violation that in order to accept the plea the judge must "formally" accept the plea via the use of the "magic words" that "the court formally accepts the plea". See Mackey v. State, 743 So.2d 1117 (Fla.

2d DCA 1999); Turner v. State, 616 So.2d 194 (Fla. 3d DCA 1993); Howard v. State, 516 So.2d 31, 32 (Fla. 1st DCA 1987)(all holding that when the transcript does not disclose that the judge formally accepted plea, defendant has absolute right to withdraw plea at sentencing). To hold that such "magic words" are necessary is outside the purpose for which the very rule was established and would cause this Court to rule upon a technical issue rather than the intended purpose behind the rule. However, in the present case, the conduct of the court and the parties clearly indicated **that a plea in fact, had been accepted**. First, it is apparent from the conduct of the parties involved at the plea hearing, that the parties intended to be bound to the conditions described in the plea agreement. The conduct of the parties was such that there was clear intention to enter a plea on the terms explained. Both Petitioner and the State began the hearing by making statements indicating the purpose for the hearing--a willingness to accept the plea upon the grounds put forth by each side. (SR 130-32). Petitioner, throughout the hearing, indicated that he understood the conditions of the plea agreement (that he was admitting to be a habitual offender, waiving his right to remain silent, that there would be a minimum mandatory sentence, that no one had coerced him to enter the plea, that he had enough time to counsel with his attorney, etc.) and **agreed** to those conditions. (SR 132-148). The State's action in stating a factual basis on the record

only furthered the notion that the parties, on both sides, intended to enter into a plea agreement. (SR 143-44). There was never any objection offered which indicated a willingness to withdraw or ambivalence as to the decision to enter into a plea agreement.

Secondly, the trial court's conduct clearly indicated that the plea had been accepted. The court went through an extensive plea colloquy to determine if the plea was being entered under the correct auspices. (SR 132-148). The trial court even recognized that the signed form was "a plea of no contest." (SR 141). Most importantly, the court's setting of this case for sentencing is clear evidence that a plea has been accepted. (SR 148). It is axiomatic that without a determination of guilt first, there can be no sentencing. Rule 3.720, Fla. R. Crim. P. (stating that "[a]s soon as practicable **after the determination of guilt** and after the examination of any presentence reports, the sentencing court shall order a sentencing hearing"). In order for the judge to set a hearing date for sentencing it is first necessary that a finding of the determination of guilt be accomplished. Because the trial court took pains to determine that there was an agreement and even set a sentencing hearing, his conduct clearly evidences the fact that this plea was considered to be accepted by the court. Because the parties and the trial judge's conduct clearly evidenced that the plea had been, in

fact, accepted, this should be recognized as more than the mere plea negotiations described in Rule 3.172.

#### Harmless Error

Assuming *arguendo* that the trial court did err, any error would have been harmless. In State v. Diquilio, 491 So. 2d 1129 (Fla. 1986), the Supreme Court of Florida discussed the principle of harmless error. The Supreme Court held that the harmless error test, as set forth in Chapman, *infra*, and its progeny, placed the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Diquilio at 1135; See Chapman v. California, 386 U.S. 18 (1967).

The Federal courts have treated the obvious acceptance conduct of trial courts as being sufficient to establish plea acceptance. The Federal interpretation of such conduct is vastly different. This difference is illuminated in the Fifth District's holding of U.S. v. Mitchell, 964 F.2d 454, 463 (C.A.5 (Tex.) 1992). The court considered a claim identical to the one Appellant raises here and held the following:

Finally, Mitchell contends that the district court erred in failing to formally accept his guilty plea before imposing the sentence. The court's judgment finding Mitchell guilty was entered December 18, 1989, three days after sentencing. While we agree that it is preferable for judges to announce their acceptances of guilty pleas in open court prior to

sentencing, any error that occurred here was harmless. The judge made an explicit finding at the plea hearing that Mitchell was pleading guilty freely and voluntarily, so the delay of three days between imposition of sentence and the formal finding of guilt deprived Mitchell of no constitutional or statutory right. Moreover, the transcript of the sentencing proceedings indicates that all parties understood that the judge had found Mitchell guilty and accepted the plea agreement.

Id. Thus, the error in failing to state the "magic words." if error, was harmless to the Appellant's conviction.

Considering the above arguments, there is no merit to Petitioner's claim that the First District court erred in affirming his motion to withdraw his plea. If this Court should choose to accept jurisdiction in the current case, it should accordingly, affirm the judgment and conviction of Petitioner.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to decline to exercise jurisdiction and submits the decision of the First District Court of Appeal reported at 826 So. 2d 1059 should be approved, and the decision entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to James T. Miller, Esq., 233 East Bay Street, Suite 920, Jacksonville, Florida 32202 by MAIL on December 10th, 2002.

Respectfully submitted and served,

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[AGO# L02-1-15583]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Kenneth D. Pratt  
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