IN THE SUPREME COURT OF FLORIDA

DWAYNE LAMONT HARRELL,
Petitioner,

vs.

CASE NO.: SC02-2444
LOWER CASE NO.: 1D01-2319

STATE OF FLORIDA,
Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Discretionary Review from the
First District Court of Appeal:
Certified Conflict of Decisions

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PRELIMINARY STATEMENT

Petitioner, Dwayne Lamont Harrell, was the Appellant before the First District Court of Appeal and the Defendant in the Circuit Court criminal proceedings. Respondent, the State of Florida, was the Appellee before the First District Court of Appeal and the state prosecuted Petitioner in the Circuit Court. References to Petitioner in this brief will either be Petitioner or Appellant. References to Respondent will either be Respondent, Appellee or the State.

In this brief, Petitioner will use the record designations used in the appeal below. The record on appeal consists of two volumes, including a supplemental volume. References to the supplemental record will be Supp.R. followed by the appropriate page number. E.G. (Supp.R. 10) References to the other volumes will be R., followed by the appropriate page number. E.g. (R. 100)

STATEMENT OF THE CASE AND FACTS

A. Statement of the facts.

A grand jury indicted Petition for first degree murder, armed robbery and two counts of possession of a firearm by a convicted felon (PFCF). (R.I. 12-13) Petition later entered a negotiated plea to one count of PFCF with a sentence of 15 years as a habitual offender - State would nolle pros murder and armed robbery and State would re-file murder and armed robbery only if PFCF plea was set aside on appeal. (R.I. 33-34) Petition signed a plea form that contained the conditions of the plea. (R.I. 33-34) Petition also reserved his right to appeal the denial of a dispositive motion (Motion to Suppress Firearm) as to the PFCF charge. (Supp.R. 131-132)

During the plea colloquy, Petition acknowledged the conditions of his plea: no contest plea to PFCF charge; 15 years sentence as a habitual offender; waiver of speedy trial as to murder and robbery charge; State may re-file the murder and robbery charges if there was a reversal of the decision to deny the motion to suppress the firearm. (Supp.R. 131-133) Petition acknowledged he understood these conditions. (Supp.R. 132-147) After the colloquy with Petition, the Court passed the case for sentencing. The Circuit Court did not state it accepted Petition's plea.

Before sentencing, Petitioner file a motion to withdraw his plea. (R.I. 36) The Circuit Court conducted a hearing on Petition's motion to withdraw plea. The motion alleged that: 1) Petition was not a habitual offender; 2) the State Attorney threatened Petition; Petition was intimidated to enter his plea. (R.I. 36) At the hearing, the Circuit Court heard evidence as to the issues of whether Petition was a habitual offender and whether the State Attorney threatened him. (The State Attorney talked to Petition about the plea offer - Petition's counsel was present.) (Supp.R. 157-163) The trial court also asked Petition questions about the plea form he signed. (Supp.R. 166-185) The trial court denied the motion to withdraw the plea. (R.I. 37)

B. Statement of the case.

Petitioner appealed the denial of his motion to withdraw his plea. The First District Court of Appeal affirmed the denial of the motion. See Appendix I, opinion Harrell v. State, September 27, 2002. The per curiam opinion noted: 1) that the transcripts of the plea hearing did not indicate whether the trial court formally accepted the plea; 2) thereafter (before sentencing), Petitioner filed a motion to withdraw his plea; 3) at trial, Petitioner did not argue (as he did on direct appeal) that he could withdraw his plea pursuant to Rule 3.172(f), Fla. R. Crim.

P. because the Court had not formally accepted. Appendix I, page 2. (In the trial court Petitioner moved to withdraw his plea because 1) he was not a habitual offender; 2) the State Attorney's Office threatened Petitioner; 3) Petitioner was intimidated to enter his plea). See (R.I. 36)

In the opinion below, the First District Court of Appeal decided the issue raised on direct appeal was not preserved pursuant to Section 924.05(3), Florida Statutes. The Court decided the issue was not raised in the trial court and Petitioner had not argued fundamental error. The majority opinion however certified conflict with Miller v. State, 775 So.2d 394, 395 n.l. (Fla. 4th DCA 2000).

Judge Benton wrote a dissenting opinion. (Appendix I, pages 4-5) Judge Benton noted that Rule 3.172(f) provides:

"At issue in the present case is the right to trial by jury in a criminal case. Florida Rule of Criminal Procedure 3.172(f) provides:

> No 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.

(Emphasis supplied.) Before the trial judge accepted appellant's plea, appellant filed a motion to withdraw a plea of

guilty, stating grounds. The trial court denied the motion, finding that the grounds were not good ones."

The dissenting opinion also noted that on appeal, Petitioner argued that he need not stated any justification whatsoever in order to have been entitled to withdraw his plea. Judge Benton also decided that the motion should have been granted, whatever grounds were or were not stated; the filing of the motion was enough to preserve the point for appellate review pursuant to Miller v. State, 775 So.2d 394, 395 n.l. (Fla. 4th DCA 2000). Lastly, Judge Benton wrote that offering unnecessary justification should not work as a forfeiture of the right to vindicate the denial of Petitioner's right to withdraw the plea.

In the initial brief on direct appeal, Petitioner argued that pursuant to Miller v. State, *supra*, he had an absolute right to withdraw the plea - he did not have to give reasons to withdraw his plea, prior to its formal acceptance. See Initial Brief Harrell v. State, Case No.: 1D01-2319, First District Court of Appeal, pages 8-9. Petitioner filed his notice to invoke based upon the Certification of Conflict with Miller v. State. On October 18, 2002, this Court accepted jurisdiction of this case.

SUMMARY OF ARGUMENT

This Court should disapprove the decision below and approve of the conflict decision in Miller v. State, 775 So.2d 394 (Fla. 4th DCA 2000). This case is not about the merits of the case below: before the trial court formally accepted Petitioner's plea pursuant to Rule 3.172(f), Fla. R. Crim. P., Petitioner moved to withdraw his plea. Petitioner stated grounds that the trial court rejected. However, under Rule 3.172(f), Petitioner did not need to state any grounds; a Defendant has the absolute right (without an justification) to withdraw his plea prior to formal acceptance. The decision below does **not** hold that Petitioner should not get relief for the merits. Conflict jurisdiction exists because this case and Miller v. State disagree on whether the mere filing of a motion to withdraw pursuant to Rule 3.172(f) preserves the issue for appellate review, if trial counsel does not raise the provisions of Rule 3.172(f), but instead raises other grounds.

On appeal before the First District Court of Appeal, Petitioner argued that pursuant to Miller v. State, *supra*, the trial court should have granted the motion to withdraw the plea. Miller v. State, held that the mere act of filing a motion to withdraw the plea preserved the issue under Rule 3.172(f) even

though the Defendant did **not** raise the ground of automatic entitlement to relief under Rule 3.172(f).

In the per curiam majority opinion below, the First District Court of Appeal decided that Petitioner had not preserved the issue raised on appeal (automatic entitlement to relief under 3.172(f)) because Petitioner did not raise this issue before the trial. The majority opinion also noted that Petitioner had not claimed fundamental error.

Judge Benton dissented the decision below. He decided that under Miller v. State, the filing of the motion to withdraw the plea preserved the issue because a Defendant need not state any justification to withdraw a plea. This Court should adopt the reasoning of Judge Benton.

The majority opinion below is illogical. Rule 3,172(f) permits the automatic withdrawal of a plea, yet the opinion below holds that Petitioner did not preserve the issue because he stated unnecessary grounds. Petitioner recognizes the general rule that one may not raise grounds on appeal that were not raised before the trial court that. That rule should not apply because Rule 3.172(f) does not require any grounds. In addition, a trial court has the responsibility as judge of the law and as a trier of fact to accept/reject a plea.

This Court should not allow a trial court to avoid responsibility for not complying with Rule 3.172(f) - if the trial court had simply read the provisions of Rule 3.172(f), then this case would not be before this Court. Neither the First District Court of Appeal nor the State of Florida contend that Petitioner should not get relief. If this Court decides that Petitioner did not preserve the issue, then Petitioner will have to file a Rule 3.850, Fla. R. Crim. P. Motion - an unnecessary waste of judicial resources.

This Court has the discretion to determine whether the trial court committed fundamental error. See Cantor v. Davis, 489 So.2d 18 (Fla. 1986) Petitioner did not raise fundamental error on direct appeal because he argued, as accepted by Judge Benton, that the motion to withdraw preserved the issue. This Court should **now** consider whether the error is fundamental. Pursuant to Rule 3.172(f) and Miller v. State, the error was fundamental.

I.

THE DECISION BELOW ERRONEOUSLY DECIDED (IN CONFLICT WITH MILLER V. STATE, 775 So.2d 394 (Fla. 4th DCA 2000) (ABSOLUTE RIGHT TO WITHDRAW PLEA BEFORE ACCEPTANCE WITHOUT ANY REASON) THAT A MOTION TO WITHDRAW A PLEA PURSUANT TO RULE 3.172(f), FLA. R. CRIM. P. DID NOT PRESERVE THE CASE FOR APPELLATE REVIEW (WHERE THE STATED GROUNDS FOR RELIEF WHERE INVALID.

A. Standard of review.

1. Jurisdiction.

The decision below certified a conflict with Miller v. State, *supra*. This Court has jurisdiction to review this case if there is a direct and express conflict on the same point of law. White Const. Co. Inc., v. Dupont, 455 So.2d 1026 (Fla. 1984).

2. Merits.

Pursuant to Rule 3.172(f) Fla. R. Crim. P. has a trial court has **no** discretion to deny a motion to withdraw a plea, prior to the formal acceptance of the plea. Miller v. State, *supra*.

B. The issues in this case: Petitioner preserved the right to withdraw his plea pursuant to Rule 3.172(f), Fla. R. Crim. P.

This Court should understand what this cause is actually about: this cause is **not** about whether Petitioner had the right

to withdraw his plea pursuant to Rule 3.172(f). As Judge Benton noted in his dissent, the majority opinion below did not decide that under Rule 3.172(f) Petitioner should not receive relief. Petitioner had the right pursuant to Rule 3.172(f) Fla. R. Crim. P. to withdraw his plea because he moved to withdraw the plea **before** the trial court accepted it.

Based upon the majority decision of the First District Court of Appeal, this case is about preservation of an issue for appellate review. The majority decision below is hyper-technical and unwise. Petitioner understands the general rule that one cannot raise an issue on appeal unless one raised that issue in the trial court (except for a claim of fundamental error). However, this rule should not apply in this case because under Rule 3.172(f), Petitioner did not have to raise **any** grounds in his 3.172(f) motion. The act of filing the motion itself preserved the issue. The Fourth District Court of Appeal in Miller v. State, 775 So.2d 394, 395 n.l. (Fla. 4th DCA 2000) held that the filing of a Rule 3.172(f) motion preserved the issue for appellate review. In Miller as in this case, the issue raised in the trial court was not the issue raised on appeal pursuant to Rule 3.172(f), Fla. R. Crim. P. Yet, the Miller court decided a motion to withdraw the plea pursuant to Rule 3.172(f) preserved the issue.

The majority decision below is hyper-technical because it holds that although one need not raise grounds in the 3.172(f) motion, Petitioner did not preserve the issue because he did not raise the ground raised on appeal (no need for justification) in the trial court.

The purpose of an objection in the trial court is to signify to the trial court that there is an issue of law and to give notice as to its nature and the terms of the issue. Carr v. State, 561 So.2d 617 (Fla. 5th DCA 1990); See also Franqui v. State, 804 So.2d 1185 (Fla. 2001). The motion to withdraw the plea should have alerted the trial court, pursuant to Rule 3.172(f), that Petitioner had an absolute right to withdraw his plea. The trial court had to know, actually or constructively, it had not formally accepted the plea. Consequently, this case is also about judicial responsibility and judicial efficiency. (If this Court rejects Petitioner's claim then a Rule 3.850, Fla. R. Crim. P. motion will be necessary. Under the circumstances of this case, this would be an inefficient waste of resources.)

If the First District Court of Appeal opinion is correct, then the trial court is resolved of all responsibility when a Defendant files a motion to withdraw a plea (and has the absolute right to have the plea withdrawn) pursuant to Rule

3.172(f) Fla. R. Crim. P. Under the circumstances of this case, the trial court had the responsibility to read and understand the provisions of 3.172(f). A trial court should not merely be a passive actor who can ignore obvious mandatory provisions of the law. If the trial court had simply read the provisions of Rule 3.172(f), then a great deal of judicial appellate resources would not have been expended: there would have been no need for the appeal to the First District Court of Appeal and for the appeal to this Court.

A trial court must be familiar with Rule 3.172(f) because a trial court is actively involved in the acceptance / rejection / withdrawal of a plea. The issue in this case is not an evidentiary or substantive issue wherein the trial court is a detached and neutral referee who rules on issues as presented/argued by the parties. In this case, the trial court must become directly involved in the plea - the court must agree to a plea; the court must conduct a plea colloquy; the court must decide that the plea is voluntary; the court must formally accept on the record (to avoid subjective misunderstandings).

The issue in this case was preserved because based upon the argument above, a trial court must allow a withdrawal of a plea under the circumstances of this case - the court had no discretion. Consequently, this Court should adopt the reasoning

of Judge Benton's dissent and the holding of Miller v. State. The ruling of the majority below is illogical - it essentially states that although you did not need to give a reason to withdraw you plea, you do not get relief because you gave wrong (and unnecessary) reasons to the trial court and the reason raised on appeal (no reasons necessary) was not raised in the trial court.

C. Fundamental error.

In the direct appeal, Petitioner did not raise the issue of fundamental error because, by definition, fundamental error involves an issue not preserved for review. In the direct appeal, Petitioner argued he had preserved the issue under Rule 3.172(f) - the position taken by Judge Benton in his dissent. However, this Court should exercise its discretion to consider this issue as fundamental error, if the Court now finds that the issue is not preserved. As the trial court had no discretion to deny the motion to withdraw the plea, the denial of the motion to withdraw the plea was fundamental error. This Court has recognized the fundamental error doctrine in plea withdrawal cases. See State v. B.P., 810 So.2d 918 (Fla. 2002); State v. T.G., 800 So.2d 204 (Fla. 2001). The Districts Courts of Appeal have also applied the fundamental error doctrine to plea

withdrawal cases. See Cuevas v. State, 770 So.2d 703 (Fla. 4th DCA 2000); Otero v. State, 696 So.2d 442 (Fla. 4th DCA 1997).

If this Court finds that the issue presented here was not preserved either in the trial court or on direct appeal, this Court should exercise its inherent discretion (to decide any issue presented by a case accepted for discretionary review) and review the issue as fundamental error. See Cantor v. Davis, 489 So.2d 18 (Fla. 1986) (once Supreme Court accepts jurisdiction it may, at its discretion, consider any issue affecting case.) See also State v. Evans, 770 So.2d 1174 (Fla. 2000) (Court would not exercise its discretion to consider issues clearly outside scope of issue certified as conflict). Pursuant to State v. Evans, the issue of fundamental error is unquestionably within the scope of the issue certified as a conflict.

CONCLUSION

This court should disapprove of the decision in this case and approve of the decision in Miller v. State, 775 So.2d 394 (Fla. 4th DCA 2000); the court should reverse the decision that denied Petitioner's motion to withdraw his plea. This Court should remand with directions to allow Petitioner to withdraw his plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 12th day of November, 2002, to: Kenneth D. Pratt, Assistant Attorney General, Office of Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050.

James T. Miller

CERTIFICATION OF TYPEFACE COMPLIANCE

Appellant certifies the type size and font used in this brief is Courier New 12.