

IN THE SUPREME COURT OF FLORIDA

DWAYNE LAMONT HARRELL,
Petitioner,

vs.

CASE NO.: SC02-2244

STATE OF FLORIDA,
Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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STATEMENT OF THE CASE AND FACTS

Respondent accepted the statement of facts in Petitioner's initial brief on the merits.

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. Conflict Jurisdiction.

Respondent notes that this Court has not yet determined that a conflict exists between this cause and Miller v. State, 775 So.2d 394 (Fla. 4th DCA 2000). Curiously, Respondent notes that the state has not briefed this issue. Yet, the State of Florida did not address this issue in the answer brief. The State of Florida could have addressed this issue in the answer brief but chose not to do so.

Miller v. State, *supra*, directly conflicts with this cause as certified by the First District Court of Appeal of Florida in the opinion below. In Miller, the Fourth District held that a motion to withdraw a plea (before its acceptance) preserved the issue even though in the trial court counsel did not raise this issue. The decision in Miller was that a motion to withdraw plea (before acceptance) entitled the Defendant to withdraw the plea. In footnote one, the Miller court noted, "While the issue

on appeal was not raised below, we conclude that the issue has been sufficiently preserved under Florida Rules of Criminal Procedure 3.172(f)." In this case, the First District Court of Appeal held that the failure to raise the provisions of Rule 3.172(f) in the trial court, precluded review on appeal. Therefore, this cause and Miller directly and expressly conflict on the issue of whether the filing of a motion to withdraw under Rule 3.172(f) preserves the issue for appellate review.

B. Preservation of the issue - fundamental error.

Respondent argues that Petitioner did not preserve the issue presented here for appellate review because he did not raise in the trial court the same issue argued here. Petitioner reiterates his argument in the initial brief that adopted the reasoning in Judge Benton's dissent. Miller v. State, supra, held that the motion to withdraw the plea pursuant to Rule 3.172(f) preserved the issue.

Respondent has not addressed Petitioner's argument that the error below as fundamental error. This court has the discretion to consider this issue. For the reasons presented in the initial brief, the error was fundamental.

C. Whether the plea was accepted.

Respondent argues that the record below shows that the plea was accepted. This argument was not made below. The record

does not show the trial court formally accepted the plea. The First District Court of Appeal, in its opinion, did not find that the plea had been accepted. A trial court must affirmatively state to the parties in open court and on the record that it accepts a plea. Mackey v. State, 743 So.2d 1117 (Fla. 2d DCA 1999); Boutwell v. State, 625 So.2d 1215 (Fla. 4th DCA 1993) Rule 3.172, Fla. R. Crim. P. (f) states that before a trial court **formally** (on the record) accepts a plea, a Defendant may withdraw the plea. The record in this case does not support Respondent's argument pursuant to Rule 3.172(f) and the cases cited above. Rule 3.172(f) states that a plea may be withdrawn by either party without any necessary justification.

D. Harmless error.

Respondent argues harmless error. Petitioner does not understand this argument. Rule 3.172(f) permits the withdrawal of a plea by either party without **any** necessary justification. Therefore, the citation of Federal case law is inapplicable to this case. In addition, U.S. v. Mitchell, 964 F. 2d 454 (5th Cir. 1992) involves a different issue than the issue in this case. (Mitchell did not involve the right to withdraw a plea but a delay between acceptance of the plea and sentencing.) Petitioner needed to establish no reason as to why he wanted to withdraw his plea - if the trial court did not formally accept

the plea, then the harmless error does not apply. Petitioner does not have to show prejudice as to the plea. Rule 3.172(f) gave Petitioner the absolute right to withdraw the plea.

CONCLUSION

This court should disapprove of the decision below; the court should approve of the decision in Miller v. State, and reverse the denial of Petitioner's motion 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 17th day of December, 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.