IN THE SUPREME COURT OF FLORIDA

ERROL AUSTIN ROLLMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 03-1871

RESPONDENT'S ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

KAREN ARMSTRONG
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0125342

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

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, Errol Austin Rollman, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by 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. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On February 12, 2001, Petitioner was charged by information with robbery with a firearm. (R.5). On October 22, 2001, the trial court issued an order finding Petitioner incompetent to stand trial. (R.56-57). Petitioner was committed to the Department of Children and Families to arrange for mental health treatment. (R.59-60).

On June 12, 2002, the trial court found that based on the opinion of three mental health experts, and the representation

of counsel, Petitioner was competent to proceed to trial. (R.144-145). During this hearing, defense counsel announced that Petitioner was ready to plead to the charge in the information. (R.145).

After questioning, the trial court found that Petitioner's plea was voluntary. (R.146-152). On August 26, 2002, Petitioner was sentenced to 10 years in the Department of Corrections, to be followed by 10 years probation.

Petitioner filed an appeal of the sentence and challenged the probationary part of his sentence. The First District Court of Appeal affirmed the sentence, but certified a question of great public importance:

> WHERE A TRIAL COURT ANNOUNCES THE MOST SEVERE SENTENCE THAT WILL BE IMPOSED IN THE EVENT OF A PLEA, MAY THE TRIAL COURT THEREAFTER, ONCE THE PLEA HAS BEEN ACCEPTED, PRONOUNCE A MORE SEVERE SENTENCE WITHOUT ANY STATED REASON OR ANY REASON APPARENT FROM THE RECORD? IF SO, MUST THE TRIAL COURT AFFIRMATIVELY OFFER THE DEFENDANT AN OPPORTUNITY TO WITHDRAW THE PLEA?

Rollman v. State, 855 So. 2d 239 (Fla 1st DCA 2003).

SUMMARY OF ARGUMENT

Petitioner plead guilty to armed robbery. Pursuant to the plea agreement, the trial court sentenced Petitioner to ten years in the Department of Corrections, to be followed by a ten year probation term. On direct appeal, Petitioner asserted that the trial court erred by sentencing him to a 10 year probation term in addition to his prison sentence. Appellant contends that he had a plea agreement with the trial court which guaranteed a 10 year sentence in prison, and that the addition of the 10 year probation term violated the agreement.

Petitioner's claim is misplaced. Although the trial court agreed to cap Petitioner's prison sentence, no other terms of the plea were agreed upon or discussed during the hearing. Nonetheless, a trial court is never bound by a plea agreement where there is no requirement that a defendant perform some act prior to sentencing. In this case, Petitioner was not required to perform some act prior to imposition of sentence, thus, the trial court is not bound by "specific performance" to the plea offer.

Even if the trial court could be bound, Petitioner is not entitled to specific performance of the plea agreement. There was not a valid, enforceable agreement because there was not a "meeting of the minds."

Under the facts of this case, there is no need for this Court to reach the certified question. It appears that defense counsel successfully lobbied the trial court at an unrecorded

bench conference to cap the prison sentence at 10 years. However, the trial court was silent as to any other provisions of the sentence, including court costs and restitution. Appellant, who pled “straight up,” faced any legal sentence within the discretion of the trial court. The trial court agreed to cap the prison sentence, which was done. The trial court was silent as to any other provisions, and as such, Appellant did not lose the benefit of any bargain. This Court should affirm, and decline to answer the certified question.

ARGUMENT

ISSUE I

IF THE TRIAL COURT ANNOUNCES ITS INTENTION TO CAP A PRISON SENTENCE AS PART OF A PLEA AGREEMENT, WHETHER PETITIONER IS ENTITLED TO THE SPECIFIC PERFORMANCE OF THAT PLEA AGREEMENT; AND WHETHER GIVEN THE PARTICULAR FACTS OF THIS CASE, THIS COURT NEED REACH THE CERTIFIED QUESTION? (Restated)

Standard of Review

The standard of review for a legal question is *de novo*. "Appellate courts are not required to defer to trial judges and administrative law judges on pure issues of law. The standard of review of legal issues involve no more than a determination whether the issue was correctly decided." Section 9.4 Philip J. Padovano, FLORIDA APPELLATE PRACTICE (2d ed. 1997).

Merits

Petitioner contends that he entered into a plea agreement with the trial court that guaranteed him a 10 year sentence in prison, and that the addition of the 10 year probation term violated the agreement. He claims that he entered the plea in exchange for a maximum sentence of 10 years mandatory minimum. In other words, he claims that he entered into an enforceable contract for a ten year prison term and is entitled to specific performance of that contract. The State disagrees.

Petitioner plead no contest "straight up" to the Court without any agreement from the State. The parties did not agree to the

sentence length or any other provisions. As the prosecutor pointed out:

> Your Honor, if we could before we go forward. Also, I just want the record to reflect this is a plea straight up. There's no agreement with the state on this particular plea as far as for any cap or anything else. I don't know if the plea agreement reflects that, but that is what has come out of our discussion at the bench.

(R.146).

Petitioner did not dispute that he was pleading "straight up" or that there was absolutely no agreement on a sentence from the State. From the record, it appears that defense counsel successfully lobbied the trial court at an unrecorded bench conference to cap the prison sentence at 10 years. (R.145-146). However, the trial court was silent as to any other provisions of the sentence. There was no negotiated plea agreement. Thus, as a result of this "straight up" plea, Petitioner faced any legal sentence within the discretion of the trial court.

During the sentencing hearing, the trial court again agreed to cap Petitioner's prison sentence at 10 years. (R.162). However, there was no agreement with the State regarding this decision. During the hearing the prosecutor argued for a sentenced beyond the 10 year cap to which the Court agreed:

> We strongly recommend that you give the defendant, as we said in our letter, twenty years in prison with a ten year minimum mandatory. He was the actual participant who wielded the firearm and pointed it at the victims. I would like to submit to you a letter from the Destin Bank, from Mr. Clay, the president, talking about the psychological affect that it had on employees of the bank, your Honor.

(R.158).

The trial court sentenced Petitioner to ten years in the Department of Corrections, to be followed by ten years of probation. (R.162). The court also ordered restitution in the amount of $6,442, and standard court costs. (R.162). Defense counsel objected to the probationary and restitution part of the sentence, and argued that they had not been contemplated during the plea hearing. (R.163).

On direct appeal, the First District Court of Appeal affirmed the sentence, but certified a question of great public importance:

> WHERE A TRIAL COURT ANNOUNCES THE MOST SEVERE SENTENCE THAT WILL BE IMPOSED IN THE EVENT OF A PLEA, MAY THE TRIAL COURT THEREAFTER, ONCE THE PLEA HAS BEEN ACCEPTED, PRONOUNCE A MORE SEVERE SENTENCE WITHOUT ANY STATED REASON OR ANY REASON APPARENT FROM THE RECORD? IF SO, MUST THE TRIAL COURT AFFIRMATIVELY OFFER THE DEFENDANT AN OPPORTUNITY TO WITHDRAW THE PLEA?

Rollman v. State, 855 So. 2d 239 (Fla 1st DCA 2003).

The certified question should be reworded to more appropriately address the facts of this case:

> IF THE TRIAL COURT ANNOUNCES ITS INTENTION TO CAP A PRISON SENTENCE AS PART OF A PLEA AGREEMENT, WHETHER PETITIONER IS ENTITLED TO THE SPECIFIC PERFORMANCE OF THAT PLEA AGREEMENT; AND WHETHER GIVEN THE PARTICULAR FACTS OF THIS CASE, THIS COURT NEED REACH THE CERTIFIED QUESTION? (Restated)

Based upon this Court's opinion in Davis v. State, 308 So.2d 27 (Fla. 1975), cited by the court below, and because of the facts of this particular case, this Court should reword the question, answer the certified question in the negative and

determine that Petitioner is not entitled to specific performance.

In Davis, the defendant agreed to plead guilty to drug felonies in exchange for adjudication withheld, a term of probation, and a term in county jail. 308 So.2d at 28. The amount of the jail term, between four months and a year, was dependant on the presentence investigation. Id. During the investigation, the defendant was arrested on another charge. At sentencing on the original charges, the trial court adjudicated Davis guilty of the charges, and placed her on probation with the condition that she serve one year in county jail. Id. On appeal, Davis demanded specific performance of the original plea agreement.

This Court disagreed and found that "even if the trial judge's indication of leniency is the *only* inducement a defendant has in pleading guilty, the court is not bound by it." Id. at 29 (emphasis in original). This Court also noted that while Santobello v. New York, 404 U.S. 257 (1971), requires specific performance of a promise made by the State, a plea discussion cannot be specifically enforced against a trial court. Id.

Davis is directly on point with the case at hand. Petitioner argues that he entered his plea based upon the promise by the trial court to cap his sentence at ten years in prison, and demands specific performance of the agreement. However, pursuant to Davis, the trial court is not bound by this agreement, even if the promise of the 10 year cap was the "only

inducement" under which Petitioner accepted the plea. Simply put, the trial court is not bound, by specific performance, to any promises of a specific sentence that it made to Petitioner in any previous plea discussion. The trial court is free to sentence Petitioner without regard to any previous promises, especially in light of the fact that Petitioner pled "straight up" to the trial court and with no agreement to any sentence by the State.

The United States Supreme Court's ruling in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 427 (1971), does not alter the results in this case, as Petitioner contends. Santobello does not discuss the role of the trial court in the plea process. That case involved a specific agreement between a defendant and the prosecutor, which the prosecutor agreed to make a recommendation to the court and then reneged on that agreement. The Supreme Court remanded the case to the state court to consider the appropriate remedy required because of the prosecutor's failure to abide by the original agreement. In arriving at that conclusion, the court observed that there was, "no absolute right to have a guilty plea accepted [citation omitted]. A court may reject a plea in the exercise of sound judicial discretion." 95 S.Ct. at 498.

As this Court noted in Davis, supra, the Court in Santobello was not talking about binding the trial court to a bargain worked out by the prosecutor and the defense. Rather, it dealt with whether the prosecutor would be bound to its part of the

deal, namely, making the recommendation that it originally agreed to make.

In Goins v. State, 672 So.2d 30 (Fla. 1996), this Court discussed the trial court's role in plea negotiations. The defendant entered into a plea agreement with the state in which he would receive 5 ½ years imprisonment followed by three years probation. Instead, the court sentenced him to nine years imprisonment followed by three years probation. The trial court did not give Goins the opportunity to withdraw his plea. The District Court of Appeal affirmed the conviction because the defendant did not move to withdraw his plea. This Court quashed the opinion, holding that when the trial court declines a plea agreement it must affirmatively allow the defendant the opportunity to withdraw the plea. Goins, 672 So.2d at 32. This Court noted:

> Negotiations often take place only between the state and the defendant, although in some instances the trial judge participates in the negotiations. Even though the plea has been accepted and regardless of whether the judge participated in the negotiations, **the judge is never bound to honor the agreement.** Davis v. State, 308 So.2d 27 (Fla.1975); Brown v. State, 245 So.2d 41 (Fla.1971).

Id. at 31.

In support of his argument that the trial court is bound by its agreement, Petitioner cites numerous cases where a defendant received specific performance of a plea agreement when the State reneged on that agreement. In State v. Davis, 188 So.2d 24 (Fla. 2nd DCA 1966), the State agreed that it would drop murder

charges against Davis if he passed a polygraph test. The polygraph examiner determined that Davis had passed the test but later changed his mind after speaking to another examiner. Davis, 188 So.2d at 26. The State decided to indict Davis on the charges, however, the trial court granted a motion to quash the indictment. On appeal, the court noted that the State agreed not to pursue charges based upon the opinion of a certain examiner that Davis was telling the truth, and the examiner had changed his mind based upon the opinion of another. Id. at 27. Thus, the court affirmed the dismissal of the charges and found that the State must be held to the letter of its agreement.

Again, in Butler v. State, 228 So.2d 421 (Fla. 4th DCA 1969), the State agreed in open court not to prosecute Butler for rape if he passed a polygraph examine. Pursuant to the agreement, the State dropped the charges when the examiner determined that Butler was telling the truth. Butler, 228 So.2d at 424. However, the State later indicted Butler again on charges from the same events, and Butler was found guilty of the charges. Id. On appeal, the Court found that the State should have been bound by its agreement not to prosecute. Id.

In Wright v. State, 599 So.2d 767 (Fla. 2nd DCA 1992), Wright entered into an agreement with the State that if he waived a jury trial in favor of a bench trial on his charges of burglary and grand theft, he would receive a sentence no harsher than probation. However, after a bench trial, Wright was found to be a habitual felony offender and placed on “habitualized

probation." Wright, 599 So.2d at 767. On appeal the court reversed the sentence and remanded the case for "imposition of straight probation as was agreed to by the state and Wright." Id.

The court in Nelson v. State, 596 So.2d 1272 (Fla. 2nd DCA 1992), considered a case where the defendant entered into a plea agreement with the state for the charge of armed robbery whereby he would cooperate with police on investigation in exchange for a lesser sentence. At the sentencing hearing, Nelson received a greater sentence than agreed upon after the State sought to withdraw from the plea because they were unaware of Nelson's previous convictions. Nelson, 596 So.2d at 1273. On appeal, the court determined that Nelson was entitled to specific performance, and remanded the case for reinstatement of the sentence within the original plea. Id.

As is evident, these cases cited by Petitioner in support of his argument that he was entitled to specific performance by the trial court all concerned agreements between the defendant and **the State**. While in some cases the trial court approved the agreements, the agreements were still between the defendant and the State.

With one narrow exception, a trial court cannot be held bound to a plea agreement in which its failure to abide by the agreement entitles the defendant to specific performance. The exception is found in those instances where there is some special condition to the plea and the defendant has already

begun to undertake (or has completed) the condition precedent. Petitioner compares his case with Charatz v. State, 577 So.2d 1298 (Fla. 1991), wherein this Court applied this narrow exception and required specific performance. In Charatz, the petitioner was adjudicated guilty of bookmaking and conspiracy to commit bookmaking and placed on probation. Later, Charatz was charged with violating his probation after he was arrested on drug charges. The trial court revoked Charatz's probation, placed him on community control, and pursuant to a plea agreement, withheld adjudication of guilt for all charges including the bookmaking charges. Charatz, 577 So.2d at 1298. Five months later, the trial court reinstated the adjudication of guilt after the State pointed out that a statute prohibited the withholding of adjudication. On appeal, this Court found that because Charatz had lived according to the plea agreement, under the constraints of community control, he had suffered irrevocable prejudice from his reliance upon the agreement. Id.

A somewhat similar situation occurred in Williams v. State, 341 So.2d 214 (Fla. 2nd DCA 1976), where the defendant had agreed to cooperate with police as an informant, in exchange for probation as a sentence for the charge of aggravated assault. After he had acted as an informant for police, the trial court set aside the plea agreement and sentenced the defendant to five years in prison after he was found guilty by a jury. Williams, 341 So.2d at 215. On appeal, the court found that because the

defendant had complied with the court-sanctioned plea bargain, he was entitled to specific performance of the plea agreement.

These cases are clearly distinguishable. In Charatz and Williams, the defendant was required to perform some affirmative action as part of the plea agreement - a condition precedent. In the case at hand, Petitioner was not required to testify in some other proceedings, act as an informant for police, or perform any other act. In other words, Petitioner was neither required to nor performed any condition precedent. Thus, Petitioner's plea agreement does not fall into the narrow exception where the trial court is bound by it.

The trial court told Petitioner that his prison sentence would

be capped at ten years. Petitioner did not rely upon this statement by the trial court to his detriment and undertake any condition precedent. However, Petitioner received the 10 year cap of a prison sentence as promised by the trial court, and therefore, suffered no prejudice. Thus, absent a contractual agreement between Petitioner and the State, or Petitioner's performance of a condition precedent, Petitioner is not entitled to specific performance.

It is true, as Petitioner argues, that rules of contract law are applicable to plea agreements. State v. Frazier, 697 So.2d 944 (Fla. 3d DCA 1997). "It is well-established that a meeting of the minds of the parties on all essential elements is a prerequisite to the existence of an enforceable contract."

Franklin Life Ins. Co. v. Davy, 753 So.2d 581, 586 (Fla. 1st DCA 1999). "[A] plea agreement is a contract requiring a meeting of the minds. When it appears any party is mistaken, confused or misunderstands essential terms of the agreement, there can be no meeting of the minds." Gray v. State, 754 So.2d 107, 109 (Fla. 4th DCA 2000).

Here, the State repeatedly asserted that it was not in agreement over the ten year prison cap. (R.158). The trial court insisted that the ten year agreement only dealt with the prison sentence, while Petitioner argued that the ten year cap applied to the entire sentence. Obviously, the State, Petitioner and the trial court never agreed as to the consequences of the plea. Thus, there was no meeting of the minds as required under contract law, and specific performance is inappropriate. Even if this Court finds that a contract existed, specific performance is not the remedy, but this case should be remanded to the trial court for Petitioner to move to withdraw his plea.

Finally, under the facts of this case, there is no need for this Court to reach the certified question. In his concurring opinion, Judge Padovano set forth the proper legal analysis. To be sure, the 10 year limitation promised by the trial court applied only to Petitioner's prison term and was not a limitation on the entire sentence. In his concurring opinion, Judge Padovono found:

> When the trial judge promised the defendant a cap of ten years, it was clear to everyone present that he was referring only to the portion of the sentence that would be served in the Department of Corrections. The judge made no promise to the defendant regarding any other aspect of the sentence.
>
> ***
>
> The term "cap" is often used in plea bargaining to refer to the maximum amount of time a defendant will serve in custody. Those who work in the criminal justice system are accustomed to thinking this way, because the scoring of an offense under the Criminal Punishment Code calculates only the applicable prison term, and has no application to probation. Likewise, the scoring under every previous version of the sentencing guidelines was keyed to prison time and did not include probation. So, within this framework, the term "cap" is generally understood to signify only the incarcerative portion of the sentence.

Rollman v. State, 855 So. 2d 239 (Fla. 1st DCA 2003). When it agreed to "cap" Petitioner's sentence, the trial court was referring only to the length of time that Petitioner would spend in prison. No other terms were discussed.

Petitioner dismisses this argument in a footnote by claiming that the word "cap" was not used during the plea hearing. To the contrary, the term was used repeatedly, including during the exchange between the trial court and the prosecutor:

> PROSECUTOR: Your Honor, if we could before we go forward. Also, I just want the record to reflect this is a plea straight up. **There's no agreement with the state on this particular plea as far as for any cap or <u>anything else</u>**. I don't know if the plea agreement reflects that, but that is what has come out of our discussion at the bench.
>
> COURT: The Court has capped it at ten.
>
> PROSECUTOR: Right, the Court indicated it would cap it at the ten year minimum mandatory under the ten-twenty life statute. However, there's no agreement with the state.

(R.146).

This exchange shows the trial court's intent and agreement to cap the prison sentence only. There was no agreement as to any other term of Petitioner's sentence. Thus, this Court need not reach the certified question because the trial court's agreement to a 10 year prison term applied only to Petitioner's time that would be spent in prison, and not to his entire sentence that included probation.

The trial court agreed, over the objection of the State, to cap Petitioner's prison sentence at 10 years. All other aspects of the plea had been left open, including any term of probation. Thus, Petitioner received all that he was promised by the trial court, and there is no issue, as stated in the certified question, as to whether the trial court can impose a more severe sentence than it had promised. Simply put, this did not happen in this case. As such, there is no need for this Court to answer the certified question, and this Court should affirm.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative or reworded, and find that Petitioner is not entitled to specific performance. However, based upon the particular facts of this case this Court need not reach the certified question, the decision of the District Court of Appeal reported at 855 So. 2d 239 should be approved, and the sentencing order 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 P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on November ____, 2003.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____
KAREN ARMSTRONG
Assistant Attorney General
Florida Bar No. 0125342

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L03-1-30997]

CERTIFICATE OF COMPLIANCE

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

_____
KAREN ARMSTRONG
Attorney for State of Florida

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