IN THE SUPREME COURT OF FLORIDA

ERROL AUSTIN ROLLMAN,

Petitioner,

v. CASE NO. SC03-1871
[1D02-3544]

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLA. BAR NO. 197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

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ERROL AUSTIN ROLLMAN, Petitioner, v. STATE OF FLORIDA, Respondent.	:	CASE NO. SC03-1871 [1D02-3544]

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses. The brief of respondent will be referred to as “RB.”

The opinion of the lower tribunal has been reported as Rollman v. State, 855 So. 2d 239 (Fla. 1st DCA 2003).

ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT WHERE A TRIAL COURT ENTERS INTO DIRECT PLEA NEGOTIATIONS WITH THE DEFENDANT, AND ANNOUNCES THE MOST SEVERE SENTENCE THAT WILL BE IMPOSED IN THE EVENT OF A PLEA, THE TRIAL COURT, ONCE THE PLEA HAS BEEN ACCEPTED, MAY NOT PRONOUNCE A MORE SEVERE SENTENCE WITHOUT ANY STATED REASON OR ANY REASON APPARENT FROM THE RECORD, AND MUST GRANT THE DEFENDANT SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT.

Petitioner entered into a plea agreement directly with the judge for a maximum sentence of 10 years mandatory minimum under §775.087(2)(a)1., Fla. Stat., while hoping for a six year youthful offender sentence under §958.04(2)(d), Fla. Stat.[1] The judge never advised petitioner that he was considering adding a term of probation to the plea agreement. The judge subsequently imposed the 10 year sentence, but also added a term of 10 years probation.

This was reversible error. Petitioner was entitled to the benefit of his bargain. The standard of review is de novo, since this is purely a question of law.

Respondent relies heavily on this Court's 28 year old opinion in Davis v. State, 308 So. 2d 27 (Fla. 1975), for the proposition that petitioner was not entitled to specific

[1]The imposition of a youthful offender sentence would remove the need for a 10 year mandatory. *See, e.g., Drury v. State*, 829 So. 2d 287 (Fla. 1st DCA 2002).

performance of his plea agreement (RB at 7-8). Davis is not controlling authority. Ms. Davis entered her plea on condition that she would receive probation with adjudication withheld. Between her plea and sentencing dates, she was arrested for a new crime. The judge subsequently placed her on probation, but did not withhold adjudication.

This Court held that the judge had the alternative of allowing Ms. Davis to withdraw her plea, and Ms. Davis had the alternative of accepting the sentence as announced by the judge.

That is not the situation presented here. Petitioner did nothing adverse in the time between his acceptance of the judge's plea offer and his sentencing to cause the judge to alter the plea agreement. Petitioner fulfilled his part of the bargain by entering his plea and giving up his constitutional right to a trial by jury. In any event, the two options approved in Davis (acceptance of the revised plea bargain or withdrawal of the plea) are not exclusive. A third option, and the only option petitioner desires, is to grant specific performance of the plea bargain he had made directly with the judge.

Respondent also relies on this Court's opinion in Goins v. State, 672 So. 2d 30 (Fla. 1996), for the proposition that

petitioner was not entitled to specific performance of his plea agreement (RB at 9-10). Goins is not on point either. It dealt with the situation where the judge could not agree to the plea negotiation worked out between the defendant and the prosecutor. It did not deal with the situation presented here, where there was a binding agreement between petitioner and the judge.

Respondent discounts the cases cited in the initial brief at 13-19,[2] in which the defendants all received specific performance of their plea agreements, because these agreements were all with the prosecutor, rather than the judge (RB at 10-12). This is a distinction without a difference. Petitioner submits that a contract between a defendant and the judge is even more important than a contract between a defendant and the prosecutor, and is equally enforceable.

Respondent claims that Charatz v. State, 577 So. 2d 1298 (Fla. 1991), and Williams v. State, 341 So. 2d 214 (Fla. 2nd DCA 1977), are not on point because there is a "narrow exception" to the general rule that a defendant is entitled to

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[2] *State v. Davis,* 188 So. 2d 24 (Fla. 2nd DCA), *cert. den.* 194 So. 2d 621 (1966); *Butler v. State*, 228 So. 2d 421 (Fla. 4th DCA 1969); *Wright v. State*, 599 So. 2d 767 (Fla. 2nd DCA 1992); and *Nelson v. State*, 596 So. 2d 1272 (Fla. 2nd DCA 1992).

specific performance of his plea bargain “where there is some special condition to the plea and the defendant has already begun to undertake (or has completed) the condition precedent.” (RB at 12). Whether or not such a “narrow exception” exists, it is clear that petitioner did perform a condition precedent as his part of the contract -- he entered his plea and gave up the valuable constitutional right to a jury trial.

Respondent does not attempt to distinguish or even mention another important case discussed in the initial brief at 22-23, Hunt v. State, 613 So. 2d 893 (Fla. 1993). There the defendant entered guilty pleas to two counts of first degree murder and other crimes, and agreed to testify against her codefendant Fotopoulos; but the sentence which she would receive (death or life) was not contingent upon her cooperation, and would be imposed after her codefendant’s trial. Ms. Hunt refused to testify against her codefendant, which the judge found to be a material breach of the plea agreement, and so he imposed the death sentences without waiting to hear the evidence in the codefendant’s trial.

This Court held that she had not breached her plea agreement and was entitled to the benefit of her bargain:

> A "constant factor" insuring basic fairness in the plea bargaining process

> is the requirement that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). It appears that defense counsel planned to rely on much of the evidence presented by the State in the Fotopoulos case to establish that Hunt was under extreme emotional distress and the substantial domination of Fotopoulos at the time of the murders. Thus, it was to the defense's advantage for Hunt's sentencing judge to consider all the evidence presented in Fotopoulos' trial whether or not Hunt testified in that case. Because **Hunt was entitled to the benefit of her bargain,** which the State made clear was not contingent on her cooperation, it was error for the court to sentence her without the benefit of the evidence presented in the Fotopoulos trial.

Id. at 897-98; bold emphasis added.

Hunt is significant because this Court recognized specific performance as a third possible remedy to the violation of a plea agreement. Hunt is also significant because it refutes respondent's view of only one "narrow exception" to the rule requiring specific performance of a plea contract.

Respondent does not attempt to distinguish or even mention another important case discussed in the initial brief at 24-25, State v. Warner, 762 So. 2d 507 (Fla. 2000). There

this Court reviewed the situations in other jurisdictions which prohibit direct plea bargaining between the defendant and the judge, known as “judicial plea bargaining,” because, it leads to at least four benefits:

> In comparing active judicial involvement with "ratification" or "plea withdrawal" procedures, other identified advantages are directness (it provides a firm basis for reliance on a plea); simplicity (it involves a single step); decorum (it provides a formal courtroom atmosphere, as contrasted with the informality of the current process); and procedural uniformity (it provides a forum for the implementation of uniform safeguards).

Id., 762 So. 2d at 513.

All four benefits are present here: “directness,” because there was a firm basis for petitioner to accept the plea; “simplicity,” because the terms of the bargain were clearly stated, and did not include the addition of probation to the prison sentence; “decorum,” because the judge offered the plea bargain in the formal atmosphere of the courtroom; and “uniformity,” because petitioner retained the option of insisting on specific performance of his agreement with the judge.

However, such a practice is not without its pitfalls, as the instant case demonstrates. If the judge offers the defendant a specific sentence bargain, and the defendant

accepts it and enters a plea in reliance on the judge's offer, the judge may not thereafter alter the terms of the agreement.

Respondent next concedes that the principles of contract law apply to plea bargains, but argues that there can be no specific performance here because there was no contract between petitioner and the prosecutor (RB at 14-15). Respondent ignores the fact that there was a contract between petitioner and the judge.

If a defendant cannot trust a judge to honor a contract, then whom can a defendant trust? If a defendant cannot trust a judge to honor a contract, there is no confidence in the criminal justice system, and the "public faith" in the system is harmed, as noted by the court in State v. Davis, 188 So. 2d 24 (Fla. 2nd DCA), *cert. den.* 194 So. 2d 621 (1966), discussed in the initial brief at 13-14.

Again, petitioner submits that a contract between a defendant and the judge is even more important than a contract between a defendant and the prosecutor, because the judge has the ability to void a contract between a defendant and the prosecutor if the judge cannot agree to its terms, under Fla. R. Crim. P. 3.172(g).

In the instant case, the contract with the judge

provided that the judge would sentence petitioner to no less than six and no more than 10 years in state prison. Petitioner entered a change of plea in reliance upon the express terms of the plea agreement offered directly by the judge. Most notably, petitioner gave up his constitutional right to a trial by jury in reliance upon the express terms of the plea agreement offered directly by the judge.

It is worth quoting again what this Court stated in Brown v. State, 367 So. 2d 616, 622 (Fla. 1979): "Bargained guilty pleas, then, are in large part similar to a contract between society and an accused, entered into on the basis of perceived 'mutuality of advantage.'"

When a plea rests in any significant part upon a promise by the judge, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. When an agreement with a defendant has not been fulfilled, the defendant is entitled to specific performance of the promise.

Finally, respondent agrees with the concurring judge's view that this was not an agreement for a specific term of years, but rather was in the nature of a "cap." (RB at 15-16). Not so. A fair reading of the record shows that the judge never mentioned the word "cap" until the prosecutor

brought it up (I R 46). A fair reading of the record shows that petitioner understood the judge to mean that he would receive a sentence between six and 10 years:

> THE COURT: Nobody is going to hurt you, Mr. Rollman. I need to ask you some more questions. Look over here just a minute, now. **Do you understand that by entering this plea the most you can get is ten years in the Department of Corrections** and that you would get credit toward that for any time you've already done in the hospital and in the jail?
>
> THE DEFENDANT. Yes, sir.
>
> * * *
>
> THE COURT: My purpose is to find out if you know what you are doing and if your plea this morning is voluntary and **if you understand the most you can get is ten years.**
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: **You're likely to get between six and ten, probably closer to the ten**. But your lawyer is going to argue for six and the state is going to argue for ten.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right, under the circumstances I'm going to find the plea to be freely and voluntarily entered this morning and accept it.

(I R 148-49; 151-52; emphasis added).

A fair reading of the record shows that at no time did

the judge mention the possibility that a term of probation might be imposed to run consecutively to the 10 year prison sentence. In fact, the judge affirmatively led petitioner to believe that he was only going to receive a prison sentence between six years as a youthful offender or 10 years, with no probation to follow.

Further evidence that there was no "cap" here comes from the exchange between petitioner's counsel and the judge when the judge added a term of 10 years probation to the plea agreement he had made with petitioner:

> MR. WEAVER: Your Honor, we're back on the record on Errol Rollman's case. I just wanted to put on the record our bench conference. I approached and explained to the court that the plea had been for an adjudication of guilt and a cap of ten years DOC and that the plea was accepted by the court about two months ago.
>
> I'm arguing to the court that the ten years probation, restitution and court costs goes beyond the cap the court had already set for the sentence. For the sake of preserving the record, I believe that goes beyond what was contemplated. I'd like to make that a part of the record.
>
> THE COURT: The record will be so noted.
>
> * * *
>
> MR. WEAVER, Just for the record, I make a motion to vacate the probationary part of the sentence and reduce the restitution to a civil judgment.

THE COURT: That motion is denied.
(I R 163-64).

The judge clearly represented to petitioner at the plea that he would receive between six and 10 years in state prison. The judge never mentioned his intent to impose a probationary term following the prison sentence. Petitioner relied on that representation in entering his plea. It was the judge who changed his position detrimental to petitioner when he added the probationary term.

The only effective means of carrying out the agreement is to grant petitioner specific performance of the agreement and to give him the benefit of his bargain. In the instant case, enforcement of the plea agreement and sentence is the proper remedy, because petitioner does not desire to withdraw his plea.

This Court must answer the first part of the certified question in the negative and hold that petitioner is entitled to specific performance of the plea agreement he had made directly with the judge. There is no need to address the second part of the certified question.

CONCLUSION

Based upon the arguments presented here, as well as in the initial brief, petitioner respectfully asks this Court to reverse the decision of the lower tribunal and remand with directions to strike the 10 year consecutive probationary term.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
P. DOUGLAS BRINKMEYER
Fla. Bar no. 197890
Assistant Public Defender
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Robert R. Wheeler and Karen Armstrong, Assistant Attorneys General, The Capitol, Tallahassee, Florida; and to petitioner, #P16875, Lancaster CI, 3449 S.W. State Road 26, Trenton, Florida 32693; on this ___ day of December, 2003.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

_____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

ERROL AUSTIN ROLLMAN,

Petitioner,

v. CASE NO. SC03-1871
[1D02-3544]

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLA. BAR NO. 197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

855 So.2d 239
28 Fla. L. Weekly D2254
(Cite as: 855 So.2d 239)

District Court of Appeal of Florida,
First District.

Errol Austin ROLLMAN, Appellant,
v.
STATE of Florida, Appellee.

No. 1D02-3544.

Sept. 26, 2003.

Defendant was convicted, on plea of nolo contendere before the Circuit Court, Okaloosa County, Thomas T. Remington, J., of robbery with a firearm, and received probationary split sentence of 10 years' imprisonment followed by 10 years' probation. Defendant appealed. The District Court of Appeal, Benton, J., held that defendant was not entitled to specific performance of trial court's sentencing promise.

Affirmed; questions certified.

Padovano, J.,concurred in result with opinion.

West Headnotes

Criminal Law k273.1(2)
110k273.1(2)

Defendant was not entitled to specific performance of trial court's express promise of maximum sentence of 10 years' imprisonment in exchange for his plea of nolo contendere, as remedy for trial court's imposition, without any stated reason or reason apparent from record, of sentence of 10 years' imprisonment followed by 10 years' probation.

***239** Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Charlie Crist, Attorney General; Karen Armstrong, Assistant Attorney General, Tallahassee, for Appellee.

BENTON, J.

On direct appeal, Errol Austin Rollman seeks specific performance of what he not unreasonably took as the trial court's promise (in exchange for his plea) to sentence him to no more than ten years' imprisonment for robbery with a firearm. As we read our supreme court's decision in *Davis v. State*, 308 So.2d 27 (Fla.1975), we are obliged to affirm, but we also certify questions of great public importance.

At a hearing on June 12, 2002, the trial judge assured Mr. Rollman, his lawyer and an assistant state attorney (who was not a party to any plea bargain) that, if he entered a plea of nolo contendere, Mr. Rollman would receive a sentence of no more than ten years in prison:

> MR. WEAVER (defense counsel): Your Honor, Mr. Rollman is entering a plea of no contest to the charge of robbery armed with a firearm. The plea agreement that we anticipate is that he would plea[d] to a cap of an adjudication of guilt and ten years in the Department of Corrections with credit for all time served since the date of his arrest....
>
> ....
>
> MR. GEISSEL (prosecutor): ... I just want the record to reflect ....[that t]here's no agreement with the state on this particular plea....
>
> THE COURT: The Court has capped it at ten.
>
> MR. GEISSEL: Right, the Court indicated it would cap it at the ten year minimum mandatory.... However, there's no agreement with the state.

Again during the plea colloquy, the trial judge reiterated, more than once, that Mr. Rollman's maximum sentence would be ten ***240** years in prison. He asked him, for example: "Do you understand that by entering this plea *the most you can get is ten years in the Department of Corrections* and that you would get credit toward that for any time you've already done ... ?" (Emphasis added.)

On August 14, 2002, however, the same trial judge who had accepted the plea pronounced a probationary split sentence. *See Poore v. State*, 531 So.2d 161, 164 (Fla.1988) (describing the possibilities for resentencing that probationary split sentences afford). He sentenced Mr. Rollman not only to ten years' imprisonment, but also to a ten-year probationary period following his release from prison, plus restitution and court costs.

Under the sentence the trial court imposed, ten years in prison is only the beginning. Because robbery with a firearm is a felony "punishable by imprisonment for a term of years not exceeding life imprisonment," § 812.13(2)(a), Fla. Stat. (2002), any subsequent revocation of probation--and it has recently been held that a probationer's failure to file a single monthly

report may justify revoking probation, *see State v. Carter*, 835 So.2d 259, 261 (Fla.2002)--might mean appellant's return to prison for the remainder of his life. [FN1] *See* § 944.275(4)(b)(3), Fla. Stat. (2002) ("State prisoners sentenced to life imprisonment shall be incarcerated for the rest of their natural lives, unless granted pardon or clemency.").

> FN1. [O]nce the court revokes probation ..., the court resentences the offender on the original charge, and may "impose any sentence which it might have originally imposed before placing the probationer ... on probation...." § 948.06(1), Fla. Stat. (1995). The court then is to grant credit for time served, unless such credit has been waived as part of a plea bargain.
> *Cozza v. State*, 756 So.2d 272, 273 (Fla. 3d DCA 2000).

At the sentencing hearing, defense counsel reminded the trial judge that he had said at the plea hearing that he would not impose a sentence in excess of ten years' imprisonment, if Mr. Rollman entered a plea of nolo contendere, [FN2] which Mr. Rollman had then done, and that the plea had been accepted. [FN3] The defense moved *ore tenus* to vacate the probationary portion of the sentence (and to dispense with restitution). [FN4] But the trial court denied the motion without stating grounds, and, in due course, the present appeal was taken. Mr. Rollman now asks us to vacate the probationary portion of the sentence he received. (He makes no argument regarding restitution.)

> FN2. MR. WEAVER: I just wanted to put on the record our bench conference. I approached and explained to the Court that the plea had been for an adjudication of guilt and a cap of ten years DOC and that that plea was accepted by the Court about two months ago.
> I'm arguing to the Court that the ten years probation, restitution and court costs goes beyond the cap the Court had already set for the sentence.
>
> FN3. In arguing that the state had not been a party to the agreement, the prosecutor did not take issue with defense counsel's description of the agreement:
> MR. GEISSEL: No, the Court agreed to a ten year cap. The state never agreed to a ten year cap.
> ....
> MR. GEISSEL: You indicated that you would do the ten year cap.
>
> FN4. MR. WEAVER: Just for the record, I make a motion to vacate the probationary part of the sentence and reduce the restitution to a civil judgment.
> THE COURT: That motion is denied.

In *Davis v. State*, 308 So.2d 27 (Fla.1975), our supreme court held that Vikki Davis was not entitled to specific performance of a plea agreement she had made with the trial court. In that case, Mrs. ***241** Davis pleaded guilty to the sale of a narcotic drug in reliance on the trial court's promise

> that the Court will place you on probation and the Court will *withhold adjudication* and that a condition of the probation will be some time in the Orange County Jail; that it will be a minimum period of at least four months and a maximum of one year. And, that eight-month period depends on what the presentence investigation reveals.

Id. at 28. But "[d]uring the pendency of the presentence investigation, ... [Mrs. Davis] was arrested for possession of less than five grams of marijuana." *Id.* The trial court adjudicated her guilty, and sentenced her to seven years' probation, with the condition that she serve one year in the Orange County Jail.

Mrs. Davis "declined to withdraw her earlier guilty plea when given the opportunity to do so; instead, she elected specific performance of the plea agreement as her remedy," *id.*, moving unsuccessfully to vacate the judgment on the ground that her adjudication violated the plea agreement. The district court affirmed without opinion, and the supreme court rejected Mrs. Davis's argument that she was "entitled to specific performance of the plea agreement entered into with the trial court," explaining:

> It is our view 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. If for any reason the plea bargain is not carried out, the defendant has two alternatives: (1) he may withdraw his plea [FN5] and proceed to a disposition of the matter without any of his admissions, statements, or other evidence given in the plea negotiations being used against him; or (2) he may agree to proceed with the guilty plea without being bound by any conditions or agreements. The result is that, if the trial judge decides not to fulfill the tentative plea agreement, the case is returned to the position it was in prior to the plea negotiations, thereby imposing no unfair

disadvantage on a defendant.

> FN5. Although he argued against the probationary term, Mr. Rollman's trial counsel did not move to withdraw the nolo contendere plea. Accordingly, Mr. Rollman seeks only vacation of the probationary portion of his sentence on the present appeal; he does not seek an opportunity to withdraw his plea. *See Anderson v. State*, 215 So.2d 618, 619 (Fla. 4th DCA 1968) ("Reversal on appeal is not to be expected in the absence of judicial error of the lower court assigned, stated and argued in appellants' brief.").

Id. at 28-29. *See also State v. Warner*, 762 So.2d 507, 514 (Fla.2000) ("A judge's preliminary evaluation of the case is not binding, since additional facts may emerge prior to sentencing which properly inform the judge's sentencing discretion. If the judge later determines that the sentence to be imposed must exceed the preliminary evaluation, then the defendant who has pleaded guilty or nolo contendere in reliance upon the judge's preliminary sentencing evaluation has an absolute right to withdraw the plea.").

The *Davis* case can be distinguished from the present case, in that the trial judge in the present case did not condition the sentence he proposed, in exchange for Mr. Rollman's plea of nolo contendere, on what the presentence investigation report might reveal; in that Mr. Rollman was not arrested for committing another offense between his plea and his sentencing; and in that, as far as the record reveals, the trial judge received no adverse information about Mr. Rollman after his plea of any kind from any source. But we read *Davis* as laying down a rule that a trial judge cannot be held even to the clearest undertaking, ***242** not even where the judge's assurances unquestionably induced a plea which may lead to life in prison.

We are not entirely certain, however, that the rule of *Davis* is intended to apply where, as here, nothing in the record explains the trial judge's change of heart; or, indeed, that the rule of *Davis* can apply here, where no "additional facts ... [come to light] prior to sentencing," *Warner*, 762 So.2d at 514, consistently with due process and the courts' essential attributes of reliability, integrity, and principled decision making. *See generally McCray v. State*, 851 So.2d 221 (Fla. 3d DCA 2003). Accordingly, we certify as questions 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?

Endorsing judges' involvement (when asked to take part) in reaching plea bargains, our supreme court recently explained that one important advantage of judicial participation is that "it provides a firm basis for reliance on a plea." *Warner*, 762 So.2d at 513. The criminal justice system will operate with greater fairness, predictability and efficiency--and in a fashion more likely to inspire public confidence--if the parties and their counsel can rely on the trial court's plea-inducing assurances, in cases where countervailing considerations do not justify a later change in position.

Affirmed.

BROWNING, J., CONCURS; PADOVANO, J., Concurring in the Result with Opinion.

PADOVANO, J., concurring in the result.

I join in the court's decision to affirm, but not for the reasons given in the majority opinion. 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. Consequently, I do not think that the trial judge violated any condition of the plea by including a twelve-year probationary term.

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.

The defendant would be entitled to relief if he had made a plea agreement with the state for a cap of ten

years in the Department of Corrections and if it was clear from the agreement that no other kind of penalty was to be imposed. If the plea agreement represents the entire understanding ***243** of the parties and if it does not mention probation, the court could infer that probation is not an option. *See Green v. State,* 700 So.2d 384 (Fla. 1st DCA 1997); *Eggers v. State,* 624 So.2d 336 (Fla. 1st DCA 1993). But the defendant in this case had no agreement with the state. All he had was the judge's promise that his prison term would not exceed ten years. The judge made no representation to the defendant regarding a fine, restitution, court costs, or probation, and he certainly did not lead the defendant to believe that he intended to make an agreement with him on any of these issues.

The defendant does not seek to withdraw his plea. Instead, he seeks specific performance of the promise he assumes the judge made to him before he entered the plea. Reduced to its essential terms, the defendant's argument is that the absence of a promise about any sanction other than the prison term is an implication that his sentence was to consist entirely of a prison term. Of course, that is not the only conclusion one could draw from these facts. A more reasonable explanation is that other potential sanctions were simply left open.

After the sentencing hearing, the defendant's lawyer argued that the total sentence including the probationary term exceeded the judge's promise for a cap of ten years. If there had been any possible chance the defendant had been confused about the conditions of his plea, the judge would have allowed him to withdraw the plea then and there. However, the judge immediately dismissed the argument. It was obvious to him, as it should have been to everyone else, that the defendant understood the risk he was facing when he entered his plea.

The majority opinion points out that the defendant could eventually receive more time than he bargained for, but that much could be said of anyone who is placed on probation. The weakness in this argument is that a greater sentence could be imposed only if the defendant were to commit a substantial violation of his probation. That would be a new event that would trigger a new set of rights and obligations. With an exception for those who receive suspended sentences, no defendant who violates probation has a right to a sentence that is within the terms of the original plea agreement.

I would affirm on the ground that the sentence does not violate any reasonable expectation the defendant may have had at the time he entered his plea.

855 So.2d 239, 28 Fla. L. Weekly D2254

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