IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant, Case No. SC04-2408

v.

ALBERTOINE NORDELUS,

Appellee.
_____/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

ANSWER (MERITS) BRIEF OF APPELLEE

Mark Skipper, Esq. P.A.
Fla. Bar No. 227226
15 S.W. 10th Street
Fort Lauderdale, Florida 33315
Telephone: (954) 523-5994
Fax: (954) 523-1994

Counsel For Appellee

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STATEMENT OF THE CASE AND FACTS

Defendant, Albertoine Nordelus, would adopt Appellant=s statement of the case as recited in their Initial Brief. As to the statement of facts, Defendant, Albertoine Nordelus, entered an open plea of guilty to the court on August 2, 2002. (T. 1-15). The plea was entered based upon the Defendant=s reliance on his trial counsel=s misadvise regarding the likelihood of success in moving for downward departure. Also, the Defendant entered the plea based upon trial counsel=s erroneous misadvise regarding the ultimate sentence, whether or not successful in receiving a downward departure.

Defendant=s trial counsel filed a frivolous motion for downward departure that did not set forth a legally cognizable ground for which relief could be granted. Moreover, trial counsel misadvised the Defendant that even if the filed motion for downward departure were denied, the Defendant would nonetheless only face a term of probation and possibly house arrest. Defendant was not advised by trial counsel that, under the correct principal of law, a denial of his motion for downward departure would result in a mandatory term of incarceration. Furthermore, the Defendant was never advised by trial counsel or the trial court that his open plea of guilty would result in a mandatory revocation of his driver=s license.

But for the affirmative misadvise of defense counsel regarding the potential imposition of a term of incarceration, the Defendant would have maintained his plea of not guilty and proceeded to a trial by jury.

POINTS ON APPEAL

I. WEATHER THE FOURTH DISTRICT COURT OF APPEALS CORRECTLY FOUND THAT DEFENDANT=S OPEN PLEA OF GUILTY WAS INVOLUNTARY WHEN ENTERED IN THE ABSENCE OF BEING ADVISED OF THE MINIMUM MANDATORY PENALTY AS REQUIRED UNDER RULE 3.172(C)(1), FLORIDA RULES OF CRIMINAL PROCEDURE?

II. WHETHER THE FOURTH DISTRICT COURT OF APPEALS CORRECTLY FOUND THAT DEFENDANT=S OPEN PLEA OF GUILTY WAS INVOLUNTARY AS IT WAS ENTERED IN RELIANCE UPON THE AFFIRMATIVE MISADVISE OF DEFENSE COUNSEL THAT THE DEFENDANT WOULD RECEIVE A SENTENCE OF PROBATION SHOULD THE MOTION FOR DOWNWARD DEPARTURE BE DENIED?

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals properly held that the Defendant=s motion for post conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure, should not have been summarily denied. Nordelus v. State, 889 So. 2d 910 (Fla. 4th DCA 2004).

The Defendant was never advised by trial counsel or the trial court at the time of the plea colloquy of the minimum mandatory direct consequence of his plea regarding the permanent revocation of his driver=s license. (T. 1-15). Accordingly, based upon the trial court=s failure to inform the Defendant of the minimum mandatory consequences of entering an open plea of guilty, the plea was involuntarily entered. Due to the involuntary nature of the plea, withdrawal must be permitted and the resulting sentence vacated.

The Defendant=s plea was also involuntarily entered due to his reliance on the affirmative misadvise received from his trial counsel. Trial counsel misadvised the Defendant that entry of an open plea of guilty with a motion for downward departure would result in a probationary term and possibly house arrest, but not incarceration, even if the motion for downward departure were denied. It must first be noted that the motion for downward departure was without legal merit in that it did not provide a legally cognizable ground upon which relief could have been granted. Beyond the fact that the motion for downward departure was frivolous, trial counsel affirmatively misadvised the Defendant regarding the possible outcome of the motion. Defense counsel advised the Defendant that even if the motion for downward departure were denied, he would only be subjected to a period of probation and possibly

house arrest. This affirmative misadvise constitutes ineffective assistance of counsel and therefore, the plea of guilty that was entered in reliance thereupon was involuntary.

As a result of the trial court=s failure to inform the Defendant of the mandatory consequences that would result from the entry of his plea and as a result of trial counsel=s affirmative misadvise the Defendant relied upon in entering his plea, the plea of guilty must be vacated as involuntarily entered.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEALS CORRECTLY FOUND THAT DEFENDANT=S OPEN PLEA OF GUILTY WAS INVOLUNTARY WHEN ENTERED IN THE ABSENCE OF BEING ADVISED OF THE MINIMUM MANDATORY PENALTY AS REQUIRED UNDER RULE 3.172(C)(1), FLORIDA RULES OF CRIMINAL PROCEDURE.

Pursuant to Rule 3.172(C)(1), Florida Rules of Criminal Procedure, the trial judge must address and determine whether the defendant understands the mandatory minimum penalty provided by law in order to establish the voluntariness of a plea. Under Section 322.28(2)(e), Florida Statutes (1999), a conviction for DUI manslaughter requires a permanent revocation of the Defendant=s driver=s license. The trial court=s failure to address with the Defendant the minimum mandatory consequence delineated under Section

322.28(2)(e) renders the plea involuntary.

The trial court is required to inform a defendant of the direct consequence of a plea. Daniels v. State, 716 So. 2d 827 (Fla. 4th DCA 1998). A direct consequence is one representing a definite, immediate and largely automatic effect on the range of the defendant=s punishment. Id. (*Citing,* Cuthrell v. Director, Patuxent Institution, 475 F. 2d 1364, 1366 (4th Cir.). *Cert. denied*, 414 U.S. 1005, 94 S.Ct. 362, 38 L.Ed. 2d 241 (1973)). A driver=s license revocation mandated by statute is a penalty contemplated by Rule 3.172(C)(1) and is a direct consequence of a plea as it represents a definite, immediate and automatic consequence where it results from a criminal conviction. Daniels v. State, 716 So. 2d 827 (Fla. 4th DCA 1998). See also; Whipple v. State, 789 So. 2d 1132 (Fla. 4th DCA 2001); Prianti v. State, 819 So. 2d 231 (Fla. 4th DCA 2002). (Both holding that a statutorily mandated driver=s license revocation upon conviction is a direct consequence that the defendant must be informed of in order for a plea to be rendered voluntary).

In Daniels v. State, the defendant entered a plea to possession of cocaine and cannabis. 716 So. 2d 827 (Fla. 4th DCA 1998). During the plea colloquy, the trial court failed to inform the defendant that entry of a plea would result in a mandatory driver=s license revocation. Id. Following imposition of

the revocation, the defendant moved to withdraw his plea on the ground that it was not voluntarily entered due to the trial court=s failure to inform him of the revocation consequence. Id. The appellate court held that the trial court=s omission substantiates the defendant=s claim that the plea was not voluntarily entered and thus requires the permitting of its withdrawal. Id.

The Defendant urges this Court to align its decision in the case at hand with the foregoing Fourth District holding in Daniels. The State advocates for the holdings of the First District as rendered in the cases of State v. Caswell, 28 Fla. L. Weekly D2492 (Fla. 1st DCA 2003) and State v. Bolware, 28 Fla. L. Weekly D2493 (Fla. 1st DCA 2003). The State=s Initial Brief contends, as does the First District opinions, that long standing case law provides for the conclusion that revocation of a driver=s license is an administrative remedy rather than a punishment, thus a collateral, rather than direct, consequence.

Within the State=s initial brief, as well as within the First District=s opinions, the long standing authority for this conclusion is cited as the case of Smith v. City of Gainesville. Id. In Smith, it was held that revocation of a driver=s license pursuant to Section 322.26, Florida Statute (no longer effective) was a collateral consequence not requiring inquiry at the time of a plea being accepted. Smith v. City of Gainesville, 93 So. 2d 105 (Fla. 1957).

The State provides a footnote to this Court in their Initial Brief claiming that although the Statute at issue before this Court is different than the one applied in Smith, the two statutes are similar and should therefore yield the same result. Although the two statutes have similarities, the Defendant would argue a distinction exists that requires a finding that a driver=s license revocation is a direct, rather than collateral, consequence.

The 1957 statute relied upon in rendering the Smith, opinion states, in pertinent part, A*The department shall* forthwith revoke the license...@ Section 322.26, Florida Statute. *(Emph. added)*. Meanwhile, the statute at issue herein states, in pertinent part, A*The court shall* permanently revoke the driver=s license...@ Section 322.28(2)(e), Florida Statute. *(Emph. added)*. The distinction in the emphasized portion shifts the authority of revoking the driver=s license from the Adepartment@ to the Acourt,@ thus, the previous administrative function of 1956 is now a judicial function.

As stated by this Court, a direct consequences are those consequences of the sentence which the court can impose. State v. Ginebra, 511 So. 2d 960, 961 (Fla. 1987). Accordingly, the assertion of the First District and within the States Initial Brief, to wit: that Athe rationale of Smith, applies with equal force to this case,@ is not valid. Because the court is charged with the

authority to impose a mandatory driver=s license revocation pursuant to statute at the time and as a part of sentencing, the driver=s license revocation in the case at hand constituted a direct consequence.

Therefore, because the permanent revocation of the Defendant=s driver=s license pursuant to Section 322.28(2)(e), Florida Statute (1999) was a direct consequence of the Defendant=s plea, the trial court was required to inform the Defendant of this consequence during the colloquy in accordance with Rule 3.172(C)(1), Florida Rules of Criminal Procedure. The trial court=s failure to determine the Defendant=s understanding of the minimum mandatory sentence to be imposed, the plea was involuntary and, therefore, withdraw must be permitted.

II. THE FOURTH DISTRICT COURT OF APPEALS CORRECTLY FOUND THAT DEFENDANT=S OPEN PLEA OF GUILTY WAS INVOLUNTARY AS IT WAS ENTERED IN RELIANCE UPON THE AFFIRMATIVE MISADVISE OF DEFENSE COUNSEL THAT THE DEFENDANT WOULD RECEIVE A SENTENCE OF PROBATION SHOULD THE MOTION FOR DOWNWARD DEPARTURE BE DENIED.

A two prong test is to be utilized to determine the ineffectiveness of counsel: (1) counsel=s conduct must have undermined the proper function of the adversary process to the extent that the proceeding cannot be relied upon

as having produced a just result and (2) But for the error of counsel, a reasonable possibility exists that the outcome would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

In the case at hand, the two prong test of Strickland, is met. From the inception of the case at hand and continuing throughout, the Defendant had maintained to his trial counsel that he was not guilty of the offenses charged. The Defendant has maintained that the other vehicle involved caused the collision by impacting the Defendant=s vehicle from the rear. However, being informed of the maximum penalty he faced in the event of a finding of guilt was thirty-two (32) years, the Defendant relented to his trial attorney=s advice to enter an open plea of guilty. Trial counsel advised the Defendant to pursue a motion for downward departure that, even if denied, would not subject him to incarceration. The Defendant=s trial counsel promised the Defendant that he would only be subject to a term of probation and possibly house arrest. Relying on this erroneous information, the Defendant entered the open plea of guilty.

Trial counsel=s misadvise undermined the proper function of the adversary process because he misadvised the Defendant as to the statutory maximum incarceration period he faced - thirty-two (32) years as opposed to

seventeen (17) years. Also undermining the proper adversary process was the fact that trial counsel advised the Defendant to pursue downward departure that had no merit. Trial counsel filed a motion for downward departure under Section 921.0026(j), Florida Statute, which requires, in part, that the defendant has shown remorse. Meanwhile, trial counsel was aware that the Defendant, believing in his innocence, was not remorseful, as stated by trial counsel on the record at the sentencing hearing. This contradiction demonstrates that trial counsel filed a frivolous motion, which the Defendant contends was done either out of a lack of competence or for the purpose of manipulating and coercing an open plea of guilty. The most egregious of trial counsel conduct that undermined the proper function of the adversary process was trial counsel=s misadvise that, even in the event of a denial of the motion for downward departure, the Defendant would be sentenced to probation and possibly house arrest. But for the misadvise of trial counsel, the Defendant would have maintained his plea of not guilty and presented his defenses at trial.

Misrepresentations by counsel as to the length of a sentence can be the basis for post-conviction relief. State v. Leroux, 689 So. 2d 235 (Fla. 1996). In Leroux, the plea colloquy addressed whether the defendant had been

promised anything in exchange for his plea of guilty and the defendant answered in the negative. Id. The defendant then filed a 3.850 motion for post-conviction relief asserting that his attorney had given him ill advice regarding the time he would actually serve on his sentence. Id. The Florida Supreme Court held that a hearing was necessary, even in light of the negative answer during the plea colloquy, to determine the merits of his claim that he relied in good faith upon the erroneous advice of his attorney in entering a plea.

Leroux, is comparable to the case at hand. In the case at hand, the trial judge conducted a plea colloquy which addressed the potential outcome in the event of a denial of the motion for downward departure. (T. 10-11). However, the claim raised by the Defendant is that trial counsel affirmatively advised the Defendant, regardless of the trial court=s statements during the colloquy, that he would not receive a sentence of incarceration if the motion for downward departure were to be denied. Trial counsel specifically told the Defendant that even if the motion for downward departure was denied, he would only be subjected to a sentence of probation and possibly house arrest. Having established a relationship with trial counsel as opposed to the trial court, the Defendant relied upon the assurances provided by his trial counsel,

regardless of the statements of the trial court.

In evaluating the claim raised herein by the Defendant, The Defendant relied upon the misadvise of trial counsel in pursing a motion for downward departure as well as in entering an open plea of guilty, believing that his motion for downward departure had merit and that even if denied, he would not be subjected to a term of incarceration.

In Rodriquez v. State, the defendant claimed ineffective assistance of counsel based upon personal communications and the relationship with his attorney. 777 So. 2d 1143 (Fla. 3rd DCA 2001). The trial court summarily denied post conviction relief and the appellate court reversed holding that the basis for the claim was not, and would likely never be, addressed on the Record and therefore, the Record did not conclusively refute the claim of ineffective assistance of counsel. Id. More specifically, one of the claims that was raised by the defendant and remanded for determination by the trial court was the allegation that counsel promised a minimal sentence if the defendant proceeded with an insanity/intoxication defense. Id.

Rodriquez, is comparable to the case at hand. In the case at hand, as in Rodriquez, the claim of the Defendant regards conversations that were not addressed on the Record as well as the promise regarding sentencing. In the

case at hand, the Defendant was promised a probationary term with the possibility of house arrest even if the motion for downward departure were to be denied. This promise as to the ultimate sentence, which, consequently, was an impossibility, constituted ineffective assistance of counsel and, as in Rodriquez, entitles the Defendant to a hearing on the merits.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Appellee respectfully requests that this Court affirm the Fourth District Court of Appeals reversal of the trial court order.

Respectfully submitted,

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Mark Skipper, Esq. P.A.
Fla. Bar No. 227226
Counsel For Appellee
15 S.W. 10th Street
Fort Lauderdale, Florida 33315
Telephone: (954) 523-5994
Fax: (954) 523-1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer (Merits) Brief of Appellee was sent via U.S. Mail to the Office of the Attorney General, Assistant Attorney General, August A. Bonavita, 1515 N.

Flagler Drive, 9th Floor, West Palm Beach, FL 33401 on this 9th day of January, 2006.

_____
Mark Skipper, Esq. P.A.
Fla. Bar No. 227226

CERTIFICATE OF TYPE SIZE AND FONT

I HEREBY CERTIFY the foregoing Answer (Merits) Brief of Appellee has been prepared in accordance with Rule 9.210(a)(2) and is written in 14 point, Times New Roman.

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Mark Skipper, Esq. P.A.
Fla. Bar No. 227226