IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

ALBERTOINE NORDELUS,

Appellee.

Case No. SC04-2408

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

INITIAL (MERITS) BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On January 2, 2001, Nordelus was charged by information with two counts of DUI Manslaughter, contrary to §§ 316.193(1)(a),(b), Fla Stat. (2000). Count One charged Nordelus under a so-called UBAL (Unlawful Blood-Alcohol Level) theory. Count Two charged him under an impairment theory. Nordelus was also charged with two misdemeanor counts of DUI with property damage (Counts III and IV). The date of the offenses is January 16, 2000.[1]

On August 2, 2002, Nordelus entered an open plea of guilty to the charges. He also filed a motion for a downward departure. On September 13, 2002, the trial court denied that motion. The court adjudicated and sentenced Nordelus to serve eleven years on Count Two.[2] He was sentenced to time-served on Counts Three and Four.

Nordelus did not directly appeal his judgment and sentence.

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[1] The record on appeal is not consecutively numbered. The record includes, Nordelus' Rule 3.850 Motion, together with a memorandum of law; State's response thereto, with attachments, including but not limited to the transcript of the August 2, 2002 change-of-plea hearing; the trial court's order denying the Motion; and the fourth district's opinion and mandate. References to the transcript will be denoted by "T" followed by the appropriate page.

[2] Count One was merged into Count Two for purposes of sentencing.

On July 11, 2003, Nordelus filed a Rule 3.850 Motion together with a memorandum of law ("Motion").

On May 18, 2004, the State filed its response to the Motion together with record exhibits ("Response").

On May 27, 2004, the trial court entered an order summarily denying the Motion relying on the Response and attachments thereto.

Nordelus appealed this order to the Fourth District Court of Appeal on June 11, 2004.

On August 26, 2004, the Fourth District Court of Appeal issued an order directing the State to respond to Grounds B and D and show cause why the trial court's order should not be remanded for an evidentiary hearing.

On October 12, 2004, the State filed its response to the lower court's order.

On December 8, 2004, the Fourth District Court of Appeal reversed the lower court's order and remanded the matter for an evidentiary hearing on these two grounds. Nordelus v. State, 889 So.2d 910 (Fla. 4th DCA 2004).

The State filed a notice to invoke the discretionary jurisdiction of this Court. The Court has also stayed the January 21, 2005 Mandate of the Fourth District Court of Appeal pending this appeal. This brief follows.

STATEMENT OF THE FACTS

Nordelus filed a Rule 3.850 Motion raising several grounds for relief. Two of those grounds are at issue here. Ground B alleges that Nordelus' plea was involuntary because it was entered in reliance upon counsel's affirmative misadvice regarding the availability of probation even if the trial court were to deny his motion for a downward departure. Ground D alleges that his plea was involuntary because counsel failed to advise Nordelus that his driver's license would be mandatorily and permanently revoked.

At the August 2nd change-of-plea hearing, the trial court advised Nordelus that Counts One and Two are second degree felonies and, according to the sentencing guidelines, he is facing between 124.8 months and 15 years (T 4). Nordelus acknowledged under oath that he understood the minimum and maximum sentence under the guidelines (T 10). Nordelus further

acknowledged that whether to grant the motion for a downward departure is within the sole discretion of the court and that if the motion is denied, Nordelus could be sentenced up to 15 years in prison (T 11).

He testified that no one promised or guaranteed to him that the trial court would grant the motion for downward departure. In addition, he acknowledged that no one told him that whether the motion is granted or denied, he would be sentenced to a term less than 124.8 months (T 11). Nor, he acknowledged, did anyone indicate to him what his sentence would be (T 11-12). The trial court found Nordelus was knowingly and voluntarily changing his plea and accordingly accepted same. The court deferred hearing the motion to depart as well as imposing sentence (T 14). It does not appear from the record that the trial court advised Nordelus that as a consequence of his plea, his driver's license would be permanently revoked.

With respect to Ground B in the Motion, Nordelus claims his plea is involuntary because his trial counsel allegedly promised him that even if his motion for downward departure were to be denied, Nordelus would receive a probationary sentence with a condition of house arrest. With respect to Ground D, Nordelus claims neither the trial court nor his attorney advised that as a direct consequence of his plea, his drivers license would be

mandatorily and permanently revoked.

On appeal, the Fourth District Court of Appeal recognized that revocation of Nordelus' drivers license was mandatory under § 322.28(2)(e), Fla. Stat. (2000). Nordelus. Following its decision in Daniels v. State, 716 So.2d 827 (Fla. 4th DCA 1998), the Fourth District Court of Appeal went on to hold that such a revocation is a "direct," as opposed to a "collateral consequence," as defined by this Court's decision in Major v. State, 814 So.2d 424 (Fla. 2002) and thus, it was necessary that Nordelus first be advised of the revocation before entering his plea. Nordelus. The Fourth District Court of Appeal certified direct and express conflict with the First District Court of Appeal in State v. Caswell, 28 Fla. L. Weekly D2492 (Fla. 1st DCA October 31, 2003) and State v. Bolware, 28 Fla. L. Weekly D2493 (Fla. 1st DCA October 31, 2003).[3]

In addition, the Fourth District Court of Appeal held that the record attachments to the trial court's order do not refute Nordelus' other claim that he was advised that he would receive a probationary sentence even if his motion for downward

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[3] The State points out that briefs on jurisdiction have been filed in *Caswell* and *Bolware* which are currently pending before this Court. Nos. SC04-12; SC04-14.

departure was denied by the trial court. Nordelus.

SUMMARY OF THE ARGUMENT

POINT I. The decision of the lower court finding that a mandatory

Revocation of a defendant’s driver’s license following a conviction

For dui manslaughter is a direct consequence of a plea is erroneous

And contrary to this court’s long-standing precedent. Revocation of a driver’s license under chapter 322 following a conviction for

Certain enumerated offenses is not regarded as punishment. Rather,

Such revocation is an administrative remedy for the protection of

The public.

Point II. The decision of the Fourth District Court of Appeal that the record does not conclusively refute Nordelus' claim that his plea is involuntary because his attorney misadvised him regarding the nature and length of his sentence is erroneous. Contrary to this finding, the record amply refutes any claim that Nordelus was misadvised regarding the nature and length of his sentence.

ARGUMENT

POINT I

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL THAT THE MANDATORY AND PERMANENT REVOCATION OF A DEFENDANT'S DRIVERS LICENSE PURSUANT TO SECTION 322.28(2)(e), Fla. STAT. (2000) IS A DIRECT (VERSUS COLLATERAL) CONSEQUENCE, THUS RENDERING A PLEA INVOLUNTARY WHERE PRIOR to entering THERETO, A DEFENDANT IS NOT ADVISED OF THE REVOCATION?

The lower court found that the mandatory and permanent revocation of a defendant's drivers license pursuant to § 322.28(2)(e), Fla. Stat. (2000) is a direct (versus collateral) consequence, as that term is defined in Major. Nordelus. As a result, the Fourth District Court of Appeal held that a defendant's plea is involuntary where prior to entering same, that defendant is not advised of the revocation. Id. The State respectfully submits this is erroneous and in contravention to this Court's long standing precedent that mandatory revocation of the driver's license under Chapter 322 following conviction for certain crimes is not relevant to punishment. Rather, such revocation purely an administrative remedy for the protection of the public. Thus, a defendant need not be advised of such a revocation prior to entering a plea.

Concluding here, as it did in Daniels v. State, 716 So.2d 827 (Fla. 4th DCA 1998), that a mandatory and permanent revocation of the drivers license is a direct consequence of a person being convicted of DUI manslaughter, the lower court reasoned that such a revocation has a "'definite, immediate, and

largely automatic effect on the range of the defendant's *punishment*.'" Nordelus (citing Major)(e.s.). However, as the First District Court of Appeal recognized in Caswell and Bolware, "[c]ase law in existence long before the circuit court addressed the issue presented in this case established that revocation of a driver's license is not a punishment of the offender, but rather, under Chapter 322, Florida Statutes, 'an administrative remedy for the public protection that mandatorily follows conviction for certain offenses…'" Id. (citations omitted).

Indeed, long ago this Court explained that revocation of a defendant's driving privileges is purely an administrative remedy for the protection of the public having nothing at all to do with punishment of the offender:

> revocation of a driver's license is not regarded as punishment of the offender. Under the applicable statute, it is an administrative remedy for the public protection that mandatorily follows conviction for certain offenses. Section 322.26, Florida Statutes, F.S.A. Among these offenses are driving "a motor vehicle while under the influence of intoxicating liquor or a narcotic drug."
>
> Smith v. City of Gainesville, 93 So.2d 105 (Fla.

1957)(c.o.).[4]

Thus, as Caswell and Bolware explained, a § 322.28(e) revocation following an adjudication for DUI manslaughter cannot be a direct consequence of a plea as that term is defined in Major since such a revocation is purely an administrative remedy for the protection of the public and it has nothing whatsoever to do with the defendant's "punishment" for the offense pled to. Id.; *see also* Fla. R. Crim. P. 3.172©(1)(requiring that a trial court inquire whether a defendant understands the mandatory minimum *penalty* provided by law, if any, and the maximum *penalty* provided by law).

The Fourth District Court of Appeal concluded that its reasoning in Daniels is sound for the reason that a passage from that decision was quoted by this Court in Major. Nordelus. The State respectfully submits this is misplaced for two reasons. First, simply because this Court quoted a passage from Daniels, does not, as the Fourth District Court of Appeal suggests, mean

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[4] While Smith refers to § 322.26, that section is substantially similar to § 322.28(e), Fla. Stat. (2000), the one at issue here. Both provisions mandate that the Department of Highway Safety and Motor Vehicles, a State agency, revoke the drivers license of any person convicted of DUI Manslaughter, § 316.193, Fla. Stat. (2000). Thus, the rationale of Smith applies with equal force to this case.

this Court approved the holding in that case. To be sure, the issue presented in Major differs from the one in Daniels and at bar.

In Major, the issue was whether a trial court or defense counsel has a duty to advise a defendant of any potential sentencing enhancements that the defendant's plea may have in the event that defendant commits future crimes. This Court held that there is no affirmative obligation to so inform a defendant because any potential effect a plea may have on future recidivism is purely a collateral consequence of a plea. Id. If anything, by citing Daniels in Major, this Court was suggesting the opposite: that the failure by either a trial court or a defense counsel to advise a defendant of a § 322.28 revocation is likewise a collateral consequence of the plea, thus, imposing no affirmative obligation on the part of the trial court or counsel to advise a defendant before accepting a plea.

Second, that the lower court's decision in both Daniels and the case at bar is incorrect is evident by this Court's decision in State v. Partlow, 840 So.2d 1040 (Fla. 2003). In Partlow, the Fourth District Court of Appeal held that the defendant should have been permitted to withdraw his plea because prior to entering it, he was not advised that once convicted he would be required to register as sexual offender. In so holding, the

lower court cited followed its reasoning in, *inter alia*, its decision in Daniels. Partlow v. State, 813 So.2d 999, 1000 (Fla. 4th DCA 2002).

However, this Court squarely rejected this analysis and held that failing to advise a defendant that upon conviction, he/she will be required to register as a sexual offender is a collateral consequence, and thus, does not render a plea involuntary. 840 So.2d at 1041. Clearly, this Court's rejection of the lower court's analysis in Partlow, including that court's reliance on Daniels, likewise signals a rejection of the Daniels decision itself. It follows that the decision of the Fourth District Court of Appeal is erroneous and accordingly, this Court should quash it.

POINT II

WHETHER THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE RECORD ATTACHMENTS DO NOT REFUTE NORDELUS' CLAIM THAT HIS PLEA WAS INVOLUNTARY BECAUSE HE WAS MISADVISED REGARDING THE LEGNTH AND NATURE OF HIS SENTENCE?

Nordelus also claims that his plea is involuntary because his attorney told him that, even if his motion for a downward departure were to be denied, Nordelus would still receive a probationary sentence with a condition of house arrest. The Fourth District Court of Appeal also held that this claim is not

refuted by the record attachments. Accordingly, the court remanded the matter for an evidentiary hearing. Nordelus. The State respectfully submits this is error since, as argued below in both the trial court and Fourth District Court of Appeal, the attached record conclusively refutes this claim.

Initially, the State would point out that should this Court determine it has jurisdiction to address the issue in Point I, *supra.*, then it may address this claim as well. *See*, Westerheide v. State, 831 So.2d 93, 105 (Fla. 2002)(once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case). The transcript of the plea hearing clearly demonstrates that Nordelus understood that he could be sentenced to a term of imprisonment between 124.8 months and 15 years (T 10). In addition, the following excerpt from the colloquy refutes Nordelus' claim:

> THE COURT: Do you understand that if I deny the motion for downward departure, I can still sentence you up to 15 years in Florida State Prison and that will be a legal sentence. Do you understand?
>
> THE DEFENDANT: Yes…
>
> THE COURT: Has anyone told you whether I am going to grant or deny your motion for downward departure? To sentence you to something less than the 124.8 months in Florida State Prison? Anyone told you anything about that?

THE DEFENDANT: No.

THE COURT: Has anyone made you any promises, any representations or told you in any way what my sentence is going to be?

THE DEFENDANT: No…

(T 11-12).

As this demonstrates, Nordelus was fully aware that whether or not the trial court granted the motion for a downward departure, he could be sentenced to serve a State prison sentence up to 15 years. Based on this, the State submits the record undeniably refutes Nordelus' claim that his plea is involuntary and thus, an evidentiary hearing is unnecessary. Fla R. Crim. P. 3.850(d). It follows that the decision of the Fourth District Court of Appeal to the contrary that this claim is not refuted by the record and that an evidentiary hearing is required, is incorrect. Accordingly, the State submits the lower court's decision should be quashed.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to QUASH the lower court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Initial Brief on the Merits" has been furnished by U.S. Mail to: MARK J. SKIPPER, Esquire, 15 Southwest Tenth Street, Fort Lauderdale, Florida, 33315, this 15th day of November, 2005.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certified that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, this 15th day of November, 2005.

_____
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