

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC05-516

v.

HERBERT DICKEY,

Respondent.

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Herbert Dickey, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his 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, followed by any appropriate page number in parentheses.

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

STATEMENT OF THE CASE AND FACTS

The State had charged the defendant, Herbert Dickey, with felony criminal mischief and felony failure to appear. (I.34). Dickey was represented by private counsel, which he retained. (I.23). On February 9, 1996, Dickey entered a plea of no contest to both offenses. The trial court conducted a plea colloquy and made certain that Dickey understood and desired to enter a plea of no contest to the charge of felony criminal

mischief and failure to appear. (I.20-21). The trial court withheld adjudication of guilt on the failure to appear, and sentenced Dickey according to the plea agreement to two years of probation for the criminal mischief. (I.19-25). On June 3, 1996, the trial court terminated the probation upon Dickey's payment of restitution as set forth in the terms of the plea agreement. (I.10-15).

On May 24, 2001, Dickey filed a motion for post-conviction relief pursuant to this Court's opinion in Wood v. State, 750 So.2d 592 (Fla. 1999). (I.1-7). The trial court found the motion was timely. (I.31). Among several claims, Dickey alleged that his attorney was ineffective for misadvising him because: "Petitioner was told by his Public Defender that he was entering a nolo contendere plea in which adjudication of guilt was withheld and which conviction was a misdemeanor offense which could not be used to enhance any future sentence. Petitioner would not have pled guilty otherwise and his present sentence is enhanced[.]" (I.5). The trial court denied appellant's motion finding that:

Ground Two of Defendant's motion is DENIED because incorrect advice as to future sentence enhancements is not actionable. Bates v. State, 818 So.2d 626(Fla. 1st Dist. Ct. App. 2002); Rhodes v. State, 701 So.2d 388 (Fla. 3d Dist. Ct. App. 1997).

(I.31-32).

Dickey appealed the trial court's order to the First District Court of Appeals. Without briefing from any of the parties, the First District held that "as a matter of law, that counsel's misadvice regarding the collateral consequence of future sentence enhancement constitutes deficient performance."

Dickey v. State, 30 Fla.L.Weekly D443(Fla. 1st DCA Feb. 15, 2005). The First District reasoned that:

Although the Florida Supreme Court initially held that a defendant did not have to be informed by court or counsel of any collateral consequences of a plea and only had to be informed of direct consequences in order for the plea to be considered knowing and voluntary, Ginebra, 511 So.2d at 962, that holding was superseded by Rule 3.172(c), De Abreu, 613 So.2d at 453 (Fla.1993), which now requires that a defendant be informed by the trial court of the potential deportation consequences of his plea. See Partlow, 840 So.2d at 1042-43. Also, the Florida Supreme Court mandated that a defendant who pleads guilty to a crime that subjects him to a potential habitual felony offender sentence must be told that habitualization could affect the possibility of early release. See State v. Wilson, 658 So.2d 521 (Fla.1995); Ashley v. State, 614 So.2d 486, 490 n. 8 (Fla.1993).

Nonetheless, despite the fact that failure to advise as to collateral consequences cannot constitute ineffective assistance of counsel, "[t]he law is well settled that if a defendant enters a plea in reasonable reliance on his attorney's advice, which in turn was based on the attorney's honest mistake or misunderstanding, the defendant should be allowed to withdraw his plea," see Leroux, 689 So.2d at 238 (citing Costello v. State, 260 So.2d 198 (Fla.1972); Brown v. State,

245 So.2d 41 (Fla.1971)), even if the mistaken advice regards a collateral consequence of the plea.

Id. The court stated that "Prejudice sufficient to warrant an evidentiary hearing is established if the defendant alleges that but for the misadvice, the defendant would not have entered the plea." Id. The court held that:

In the present case, appellant has stated a timely, facially sufficient claim entitling him to an opportunity to prove at an evidentiary hearing that his counsel volunteered, or was asked and gave, affirmative misadvice on the future sentence enhancement consequences of his plea, that he relied on that misadvice when entering the plea, and that he would not have entered the plea had it not been for this misadvice. Then, and only then, is appellant entitled to the relief he ultimately seeks: a finding that his counsel was ineffective and a vacation of his conviction and sentence through withdrawal of his plea. If withdrawal of his plea is appellant's election, he does so at his own peril, because the state shall have the opportunity to try him.

We reverse the trial court's summary denial of this claim and remand with instructions that the trial court hold an evidentiary hearing thereon. We recertify the earlier question as a question of great public importance.

Id.

SUMMARY OF ARGUMENT

Misadvice regarding the future sentencing enhancing consequences of a plea does not render a plea involuntary and is not a ground for relief in a post-conviction motion claiming ineffective assistance of counsel. Criminal defendants, like all citizens, have a duty to follow the law and refrain from committing criminal acts. Therefore, regardless of whether a defendant is given correct or incorrect advice about future enhanced punishment a defendant is obligated to follow the law. Moreover, unlike other collateral consequence resulting from a plea such as the loss of gain time, additional conditions of supervision, or deportation, a criminal defendant can avoid any future sentencing enhancements by refraining from committing new offenses.

Furthermore, advice on future consequences based on uncertainties is too attenuated to be relied upon. A defendant cannot expect counsel to accurately advise him as to what penalty he will receive for crimes not yet committed. Additionally, the purpose of the sentencing enhancing statutes is to discourage recidivism, and allowing a defendant to withdraw a plea many years later because it was used to enhance a future sentence will encourage recidivism. In fact, a defendant should expect to get punished for committing a new

offense, and a defendant should be aware that a prior conviction for a crime may cause him to be punished more harshly than a first-time offender. Therefore, the misadvice regarding future sentencing consequences does not entitle a defendant to withdraw his plea, and should not be cognizable in a post-conviction motion.

ARGUMENT

ISSUE I

WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCE-ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA FOR FUTURE CRIMINAL BEHAVIOR IN AN OTHERWISE FACIALLY SUFFICIENT MOTION ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM? (Restated)

Standard of Review

The issue of whether the trial court properly denied the motion for post-conviction relief is a legal determination which this Court reviews de novo.

Preservation

The District Court reviewed this case pursuant to Florida Rule of Appellate Procedure 9.141(b)(2)(C), which provides that briefs or oral argument are not required. The court did not request briefing from the parties, and therefore the State could not present this argument to the First District.

Argument

Respondent Dickey filed a motion for post conviction relief claiming that his attorney told him that he was entering a nolo contendere plea to an offense which "was a misdemeanor offense which could not be used to enhance any future sentence." ¹(I.5).

¹ Regarding his claim that his attorney misinformed him that he was entering a plea to a misdemeanor, that claim is refuted by

The circuit court denied the claim "because incorrect advice as to future sentence enhancements is not actionable." (I.31-32). The First District erred by finding as a matter of law that misadvice regarding consequences of future misconduct constitutes a deficient performance on the part of counsel. Dickey v. State, 30 Fla. L. Weekly D443 (Fla. 1st DCA Feb. 15, 2005)

"[N]either the defense attorney nor the trial court is duty-bound to anticipate the defendant's recidivism and warn him of the sentence-enhancing consequences his plea may have for any future crimes he commits[.]" Ford v. State, 753 So.2d 595, 596 (Fla. 3d DCA 2000). In Major v. State, 814 So.2d 424 (Fla.2002), this Court held that the trial court and a defendant's attorney are required to inform a defendant only of the direct consequences of his or her plea and have no duty to apprise him or her of the collateral consequences. Id. at 431. "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment. Id. citing, Zambuto v. State, 413 So.2d 461, 462

the transcript of the plea hearing in which the trial court clarified on the record that Dickey wished to enter a nolo contendere plea to a felony criminal mischief and failure to appear. (I.20-21).

(Fla. 4th DCA 1982). This Court has held that the use of a conviction to enhance a future sentence is a collateral consequence which does not render a plea involuntary. Id. at 428-429.

The First District reasoned that relief has been granted to defendants, who have claimed affirmative misadvice regarding whether a plea would effect availability of permanent citizenship, deportation, civil commitment pursuant to the Sexually Violent Predators Act, gain time, occupational licensing or future employment as a correctional officer, or loss of the right to vote. Dickey. Because relief is granted based showing of reasonable reliance upon the misadvice regarding those collateral consequences, the court concluded that misadvice about future sentencing consequences was grounds for a claim of ineffective assistance of counsel as well. Id.

However, the First District overlooked the fact that "unlike other collateral consequences, such as deportation or gain time eligibility, the future sentence-enhancing effects of a guilty plea only apply if the defendant commits a future criminal offense." Stansel v. State, 825 So.2d 1007, 1009 (Fla. 2d DCA 2002). "Thus, the defendant can always avoid the future sentence-enhancing effects of a plea by obeying the law." Id. In fact, "[s]ociety places upon defendants, as it does on

all citizens, an obligation to follow the law." Id. Major v. State, 790 So.2d 550 (Fla. 3d DCA 2001)("As a matter of common sense, a defendant is already under a legal duty not to go out and commit more crimes in the future, regardless of whether the penalty is 'ordinary' or enhanced."). "[B]ecause the defendant is under a legal duty to refrain from committing further crimes. It makes no difference whether the defendant is given correct, or incorrect, advice regarding the possibility of enhanced punishment." Scott v. State, 813 So. 2d 1025 (Fla. 3d DCA 2002). Major v. State, 790 So.2d 550 (Fla. 3d DCA 2001)("The defendant can avoid further sentencing consequences, enhanced or otherwise, by refraining from committing new crimes.").

In fact, "[i]t should be apparent to a defendant that a prior conviction for a crime may cause him to be punished more harshly than a first-time offender." Stansel at 1009. See Lewis v. United States, 902 F.2d 576, 577 (7th Cir.1990) ("The warning is needless; everyone knows that second and subsequent offenders tend to be punished more heavily than first offenders."). "[P]ublication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions." State v. Beasley, 580 So.2d 139, 142 (Fla. 1991). The statutes contain many difference sentence enhancements based upon prior convictions. For

example, prior convictions are used to enhance sentences pursuant to the habitual offender statute, § 775.084, Florida Statute, and the prison releasee reoffender statute, § 775.082(9), Florida Statute. Thus, Dickey should have known that if, in fact, counsel did tell him that his conviction "could not be used to enhance any future sentence", that advice was incorrect.

Moreover, advice on future consequences based on uncertainties is too attenuated to be relied upon. The Third District explained in Collier v. State, 796 So.2d 629 (Fla. 3d DCA 2001), that "[a]ssuming counsel advised defendant that his 1990 plea could not be used against him in the future, such advice is properly viewed as addressing the civil effects of the plea, not future recidivism. 'Neither the court nor counsel is required to advise a defendant what penalty he can expect to receive for crimes not yet committed.'" Id. at 630, citing, Major v. State, 790 So.2d 550, 551, 552 (Fla. 3d DCA 2001).

In Rhodes v. State, 701 So.2d 388, 389 (Fla. 3d DCA 1997), the court stated that:

As a matter of public policy, recidivism should not be encouraged. The "misadvice" allegedly given the defendant in the instant case--the possibility of an enhanced sentence on future crimes--must be distinguished from the "misadvice" given in the cases cited above--advice regarding deportation, gain time eligibility, parole eligibility. The latter issues affect only the

defendant himself, whereas the former could involve the safety of the community as well. We should not encourage recidivism, even implicitly, by adopting a rule of law which requires a defense attorney or trial court to "warn" a defendant of the sentence-enhancing consequences his plea will have as to any future crimes he may commit. See Lewis v. United States, 902 F.2d 576, 577 (7th Cir.1990) ("It [the warning of future sentence enhancement] could even be viewed as an invitation to recidivism...") Moreover, we believe that the possibility of enhanced future sentences has an even more attenuated connection to the disputed plea than do the other collateral consequences deemed sufficiently harmful to the defendant to permit vacation of his plea.

(Emphasis added).

Even if warning a defendant that his conviction will have sentencing-enhancing consequences on future crimes does not encourage recidivism, certainly allowing a defendant to withdraw a plea many years later because it was used to enhance a future sentence does encourage recidivism. "[T]he purpose of enhancement statutes is to punish and deter recidivism." Bates v. State, 818 So.2d 626, 630 (Fla. 1st DCA 2002), quashed on other grounds, 887 So.2d 1214(Fla. 2004). "To allow [a defendant] to withdraw his plea based on affirmative misadvice of counsel concerning future sentencing enhancing consequences of his plea would frustrate this purpose." Id. See McKowen v. State, 831 So.2d 794, 796 (Fla. 5th DCA 2002)("concluding that a defendant is not entitled to receive postconviction relief based

on a claim that he relied on the misadvice of counsel that his plea would have no adverse sentencing effect should he decide to commit future crimes. To rule otherwise would be to encourage recidivism and frustrate the purpose of the statutory sentencing scheme which enhances sentences based on past criminal behavior.").

The First District's reliance on cases regarding misadvice about other collateral consequences is misplaced as those cases can be easily distinguished. The consequences of misadvice regarding whether a plea would have an effect on permanent citizenship, deportation, civil commitment pursuant to the Sexually Violent Predators Act, eligibility for gain time, occupational licensing, employment as a correctional officer, or loss of the right to vote, is fixed at the time of plea and are not contingent on events which may or may not occur. Additionally, the misadvice related to a consequence which resulted from the plea or conviction itself, not the subsequent conduct of the defendant. The consequence was not conditioned on the defendant re-offending. However, when a defendant alleges misadvice about future sentence enhancement, it is entirely within the defendant's control to avoid the enhancement by not re-offending. Justice Cantero recognized this

distinction in his concurring opinion in Bates v. State, 887 So.2d 1214 (Fla. 2004), stating that:

As several district courts have recognized, a fundamental difference exists between incorrect advice about collateral consequences of a plea such as deportation and loss of employment and incorrect advice about future crimes. In the former cases, the consequences, while collateral to the conviction, are immediate, result directly from the plea at issue, and occur regardless of the defendant's future conduct. When the consequence is a sentence enhancement for a future crime, however, it is contingent on the commission of another felony, which may never occur. **It is the defendant's decision to commit another felony, not the wrong advice, that produces the enhanced sentence.**

Id. at 1223. (Emphasis added).

Accordingly, the First District's decision in the case at bar and the Fourth District's decision in Burns v. State, 826 So.2d 1055, (Fla. 4th DCA 2002); Ghanavati v. State, 820 So.2d 989(Fla. 4th DCA 2002); Murphy v. State, 820 So.2d 375 (Fla. 4th DCA 2002); Love v. State, 814 So.2d 475 (Fla. 4th DCA 2002); Jones v. State, 814 So.2d 446 (Fla. 4th DCA 2001), allowing defendants in post-conviction motions to present claims of ineffective assistance of counsel or involuntariness of a plea because of misadvice of the sentencing enhancing consequences of the plea in subsequent proceedings is contrary to public policy, and those cases should be overruled. This Court should affirm the reasoning of the Second, Third, and Fifth District Courts of

Appeal, and hold that claims of misadvice regarding the future sentencing enhancing consequences of a plea on subsequent crimes is not cognizable in a post conviction motion.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal in the case at bar should be overruled, and the 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.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on ____ day of April, 2005.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

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