IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-936

VICTOR X. RIVERA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

* *

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. The Petitioner was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "SR" refers to the original record on appeal in the Third District Court of Appeal, which has been filed in this Court. The symbol “PB” refers to Petitioner’s initial brief on the merits. Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts appearing on pages 2 through 6 of his initial brief to the extent that it is accurate and nonargumentative, and states:

On September 5, 2000, Petitioner was charged by amended information with attempted second-degree murder of Ana Alarcol (count 1), and two counts of aggravated battery with a deadly weapon on Ana Alarcol (counts 2 and 3), all of which allegedly occurred on July 29, 2000. On August 9, 2001, Petitioner pled no contest to the charges in return for a sentence of two years community control followed by four years probation, with the special condition that he would enter and successfully complete the Dade County Boot Camp Program. After his community control was modified to probation, Petitioner's probation was subsequently revoked on December 27, 2005, for violation of several terms of his probation.

At the probation hearing of December 27, 2005, defense counsel initially announced that the State had offered Petitioner a plea below the guidelines to three years in the Modality Program in prison. (SR 9). After the trial court rejected Petitioner's counter-offer of 364 days in the TASC program, and after the court stated that it would consider early

termination of Petitioner's three-year sentence after he completed the Modality Program, which the court noted would take 2 to 2½ years, Petitioner's counsel announced, "He wants to take it, Judge." (SR 9-10). Upon admitting the alleged probation violations pursuant to the negotiated plea bargain, Petitioner was thereupon sentenced to three (3) years in prison with 37 days of credit for time served, i.e., from November 21 to December 27, 2005. (SR 8-16).

Petitioner thereafter filed a petition for writ of habeas corpus in the trial court, in which he alleged that he had not been awarded the appropriate amount of jail time credit at his sentencing. Upon the trial court's summary denial of this petition, Petitioner appealed to the Third District Court of Appeal, which reversed the order, appointed the public defender's office to represent Petitioner in pursuing his claim in the trial court, and ordered the trial court to expedite review in light of its decision. Rivera v. State, 949 So. 2d 324 (Fla. 3d DCA 2007). Following the trial court's prompt review and subsequent denial of the habeas petition in a seven-page order (SR 1-7), Petitioner's expedited appeal ensued.

On April 18, 2007, the Third District Court of Appeal per curiam affirmed the trial court's ruling on the authority of its

prior decision in Fulcher v. State, 875 So. 2d 647 (Fla. 3d DCA 2004), and held that Petitioner's claim for additional credit for time served was inconsistent with the terms of the plea agreement and would reach "an absurd result by undoing the amounts of time the defendant specifically agreed to serve." Rivera v. State, 954 So. 2d 1216, 1218 (Fla. 3d DCA 2007). In footnote two of its opinion, the district court, through Chief Judge Cope, addressed the trial court's ruling that a waiver had been shown, stating that the Fulcher decision was "dispositive and applicable *in the absence of a waiver.*" 954 So. 2d at 1218, n. 2.

SUMMARY OF THE ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT PETITIONER WAS NOT ENTITLED TO ADDITIONAL CREDIT FOR TIME SERVED THAT WAS INCONSISTENT WITH THE AMOUNT OF TIME PETITIONER SPECIFICALLY AGREED TO SERVE PURSUANT TO HIS PLEA AGREEMENT, SINCE THE GRANTING OF SUCH CREDIT WOULD LEAD TO AN "ABSURD RESULT."

II. THE DISTRICT COURT PROPERLY HELD THAT THE REMEDY FOR THE APPARENT MUTUAL MISTAKE OF FACT REGARDING THE AMOUNT OF TIME PETITIONER HAD PREVIOUSLY SERVED WAS NOT PETITIONER'S IMMEDIATE RELEASE, BUT RATHER WAS PETITIONER'S OPTION TO STAND BY THE PLEA BARGAIN OR WITHDRAW HIS PLEA AND PROCEED TO A HEARING ON THE ORIGINAL REVOCATION OF PROBATION CHARGES.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT PETITIONER WAS NOT ENTITLED TO ADDITIONAL CREDIT FOR TIME SERVED THAT WAS INCONSISTENT WITH THE AMOUNT OF TIME PETITIONER SPECIFICALLY AGREED TO SERVE IN HIS PLEA AGREEMENT, SINCE THE GRANTING OF SUCH CREDIT WOULD LEAD TO AN "ABSURD RESULT."

In his initial brief, Petitioner asserts that the Third District failed to follow the "rule of law" that a defendant does not waive any additional credit for time served, unless the waiver of this credit is specifically mentioned as part of the plea agreement. (PB 8, 11). The State strongly disagrees. Petitioner's allegation that the district court's decision below is at odds with decisions of other district courts of appeal is without merit. Indeed, the Third District's opinion expressly makes clear that the court was ***not*** deciding the case based on any waiver theory, but rather was deciding the case based upon its prior decision in Fulcher v. State, 875 So. 2d 647 (Fla. 3d DCA 2004), involving a plea agreement entered into on a mutual mistake of fact, which the Third District expressly found "dispositive and applicable ***in the absence of a waiver***." Rivera, 954 So. 2d 1216, 1218 n. 2. Since the Third District deliberately chose to avoid deciding the waiver issue, and decided the case on a wholly different basis than that of the

"waiver" cases cited by Petitioner, it is clear that Petitioner's argument regarding a knowing and voluntary waiver is simply inapposite.

Accordingly, contrary to Petitioner's assertion, the Third District's decision did not modify the law concerning the waiver of additional credit for time served by creating what Petitioner refers to as an "implicit intent waiver exception." Rather, obviously guided by principles of equity and fairness in effectuating the intent of the plea agreement, the Third District merely applied its prior holding in Fulcher, a factually similar case, in order to avoid an "absurd result by undoing the amounts of time the defendant specifically agreed to serve" pursuant to his plea agreement. Indeed, under the unique facts of the instant case, applying an additional 732 days credit for time served against Petitioner's three-year downward departure sentence would limit Petitioner's incarceration to eleven months. However, as the district court observed, this eleven month time period would be "totally inconsistent" with the eighteen months required for completion of the Modality Program, which the trial court intended in imposing the downward departure sentence. An eleven month term of incarceration would also be wholly inconsistent with the trial court's estimate of 2

to 2½ years, with which Petitioner expressly agreed at the time he accepted the plea. (SR 9-10). Thus, since the intent and purpose of Petitioner's negotiated downward departure sentence would be thwarted by awarding him the additional credit for time served, the Third District properly declined to do so. Because the downward departure sentence would be rendered meaningless if Petitioner received the credit, it is therefore obvious that the additional credit was not intended as part of the plea agreement.

The district court's avoidance of this "absurd result" is a fact which distinguishes the instant case from the cases cited by Petitioner. Indeed, in none of these cases can it be said that the sentence imposed by the court on probation revocation would have been rendered absurd or meaningless had the prior credit been imposed by virtue of the plea agreement. Significantly, unlike the instant case, the facts of these other cases do not reveal situations in which the sentence imposed on revocation would become meaningless or cause an "absurd result" since the prior credits would negate the new sentence and thereby undermine its obvious intent. Furthermore, because of the factual situation here involving a possible "mutual mistake of fact" regarding the amount of time Petitioner had previously

served, the Third District concluded that Petitioner could stand by his plea bargain or could withdraw his plea and proceed to a hearing on the original revocation of probation, another distinguishing feature from the cases relied on by Petitioner. Rivera, 954 So. 2d at 1218.

II. THE DISTRICT COURT PROPERLY HELD THAT THE REMEDY FOR THE APPARENT MUTUAL MISTAKE OF FACT REGARDING THE AMOUNT OF TIME PETITIONER HAD PREVIOUSLY SERVED WAS NOT PETITIONER'S IMMEDIATE RELEASE, BUT RATHER WAS PETITIONER'S OPTION TO STAND BY THE PLEA BARGAIN OR WITHDRAW HIS PLEA AND PROCEED TO A HEARING ON THE ORIGINAL REVOCATION OF PROBATION CHARGES.

Petitioner argues that the proper remedy for the apparent mutual mistake of fact regarding the amount of time he previously served was the award of credit for all time served since his initial arrest, i.e., immediate release, rather than giving Petitioner the option to stand by the plea bargain or to withdraw his plea. For the following reasons, the State strongly disagrees.

First of all, contrary to Petitioner's assumption, the Third District's decision did not hold that a mutual mistake of material fact actually existed regarding the amount of credit to which Petitioner was entitled. Instead, the appellate court merely noted that the plea agreement was "evidently" entered into on a mutual mistake of fact regarding the amount of time previously served. Rivera, 954 So. 2d at 1218. To be sure, whether such a mutual mistake actually existed would be a question of fact to be determined at an evidentiary hearing conducted before the trial court. However, since Petitioner

sought in his habeas petition a corrected sentence awarding him the proper amount of credit for time served, his habeas petition would be properly treated as a motion to correct illegal sentence under rule Fla. R. Crim. P. 3.800(a), pursuant to which Petitioner would not be entitled to an evidentiary hearing. See Renaud v. State, 926 So. 2d 1241, 1242 (Fla. 2006) [rule 3.800(a) "does not contemplate the necessity of an evidentiary hearing"]; accord Williams v. State, 957 So. 2d 600, 602 (Fla. 2007); see also Baker v. State, 878 So. 2d 1236, 1240-41 (Fla. 2004) (petition for writ of habeas corpus is not permissible to test the legality of a prisoner's criminal judgment as a substitute for seeking relief through an appropriate postconviction motion; rule of criminal procedure governing motions to vacate, set aside, or correct sentence is the sole procedural mechanism for raising those collateral postconviction challenges to the legality of noncapital criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus). Given the absence of an evidentiary hearing in the case at bar, it is clear that the fact of a mutual mistake between the parties was not established. As such, Petitioner's argument as to the appropriate remedy for this purported mutual mistake is unnecessary and inapposite.

The above notwithstanding, as used in the Restatement (Second) of Contracts §151 (1981), relied on by Petitioner, the word "mistake" is defined as "an erroneous belief." A party's erroneous belief is therefore said to be a "mistake" of that party. Id. Furthermore, the erroneous belief must relate to the facts as they exist at the time of the making of the contract. Id. Here, however, it is clear that Petitioner, at the time he entered into his plea agreement, had no "erroneous belief" concerning the credit for time served he would receive. Based on the record plea discussions between the trial court and defense counsel, Petitioner must have believed that he would be in custody for 2½ years in order to complete the Modality Program. The trial judge made clear to Petitioner at the plea hearing that he would not terminate his probation until after he completed the Modality Program, which the court noted would take 2 to 2½ years. (SR 9-10). After further discussion with Petitioner, defense counsel announced, "He (Petitioner) wants to take it, Judge." (SR 9-10). Thus, there is nothing to suggest that Petitioner's belief concerning his credit for time served was erroneous, i.e., that there existed a "mistake" of Petitioner. There was no pre-agreement mistake within the meaning of the Restatement (Second) of Contracts §151 (1981), as

asserted by Petitioner, but instead only an omission by the trial court to pronounce after-the-fact what was undoubtedly intended by the plea agreement.

Lastly, Petitioner's argument that the plea agreement is not voidable by the State since it bears the risk of any mistake regarding entitlement to credit for time served is misplaced. In this regard, Petitioner's reliance on the Restatement (Second) of Contracts §154(b) (1981) for allocating the risk to the State due to its putative knowledge is incorrect. Indeed, the State submits that this provision of the Restatement is inapplicable to the facts here. For, the knowledge of the parties at the time of the plea bargain indicates that Petitioner would be required to serve approximately 2½ years to complete the Modality Program. Moreover, Petitioner's assertion that the State acted in "conscious ignorance" of his possible entitlement to additional credit is specious, especially given the fact that Petitioner's failure to apprise the trial court of its failure to pronounce a waiver of credit, which arguably resulted in the "windfall" of immediate release, amounted to a lack of good faith and fair dealing on his part which precludes relief. See Restatement (Second) of Contracts §157 (1981) ("A mistaken party's fault in failing to know or discover the facts

before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, *unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing*.") (emphasis supplied).

In the event this Court determines that a mutual mistake of material fact existed in the instant case, the State would submit that consistent with well-established law holding that a plea bargain is a contract which can be set aside for a mutual mistake of material fact, see Brown v. State, 245 So. 2d 41 (Fla. 1971); Jackson v. State, 810 So. 2d 1024 (Fla. 5th DCA 2001); Coward v. State, 547 So. 2d 990 (Fla. 1st DCA 1989), Petitioner would be entitled to the option of withdrawing his plea and proceeding to a hearing on the revocation of probation charges. See Forbert v. State, 437 So. 2d 1079, 1081 (Fla. 1983) (a defendant should be allowed to withdraw plea where the plea was based upon a misunderstanding or misapprehension of facts considered by defendant in making the plea); Brown, 245 So. 2d at 43-44 (same).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court approve the decision of the Third District Court of Appeal in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was furnished by U.S. Mail to Shannon P. McKenna, Asst. Public Defender, Counsel for Petitioner, 1320 NW 14th Street, Miami, FL 33125, on this ____ day of February, 2008, and that the 12 point Courier New font used in this brief complies with the requirements of Fla. R. App. P. 9.210(a)(2).

_____
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Senior Assistant Attorney General