IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC08-2127

ROBERT GENE BRUCE,

Respondent.
_____________________________/

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This case is before the Court on a certified question of great public importance. Before this brief was filed, the Court recalled the First District's mandate vacating Bruce's conviction. Bruce's motion to reconsider the recall of the mandate, filed December 4, 2008, remained pending.

In this brief, Respondent argues first for a discharge of jurisdiction and second for approval of the decision below, Bruce v. State, 993 So. 2d 155 (Fla. 1st DCA 2008).

Herein, the record on appeal is cited "R."

STATEMENT OF THE CASE AND THE FACTS

In addition to the pertinent procedural facts presented by the state, during the plea hearing below, the prosecutor acknowledged that sentences for both felony driving while license suspended for multiple convictions and felony driving while license suspended as a habitual traffic offender, which was also charged, would violate the constitutional prohibition on double jeopardy. (R13) Further, section 322.34(2), Florida Statutes (2006), under which Bruce was convicted and sentenced, is on its face inapplicable to persons whose licenses were suspended pursuant to section 322.264, Florida Statutes, the habitual traffic offender statute.

The plea agreement did not include a specific sentence recommendation. (R29-32) During the colloquy, the court told Bruce "I promise you nothing" and warned he could receive up to five years in prison. (R12) Bruce's Criminal Punishment Code scoresheet did not compel a state prison sentence, and would not have compelled a prison term even with the addition of 0.9 points under "Additional Offenses" for the counts dismissed as part of the plea agreement. (R34-35)

SUMMARY OF THE ARGUMENT

I. Discretionary review is an unnecessary use of this Court's resources. An answer to the certified question will apply only to third convictions of driving while license suspended that rest in part on prior convictions for offenses committed before Jan. 1, 1997, and obtained via negotiated plea. There is no interdistrict conflict on this issue and the difference of opinion within the First District should first be addressed by that Court en banc.

II. Due process of law precludes conviction of a crime that did not occur, even if obtained via negotiated plea. The error goes to the foundations of our criminal justice system because it results in criminal punishment for noncriminal conduct, and therefore cannot be waived merely because the conviction was obtained by negotiated plea entered without knowledge of the constitutional defect. Waiver by plea of the lesser protection against a redundant conviction under Novaton v. State, 634 So. 2d 607 (Fla. 1994), is not analogous; nor is waiver by plea to a lesser included offense made with knowledge that the offense is contrary to the facts. Therefore, Bruce's felony DWLS conviction, which rests on a prior conviction lacking the essential element of knowledge of the suspension, constitutes fundamental error. Fundamental error is an exception to court rules precluding guilty plea appeals.

ARGUMENT

I. REVIEW SHOULD BE DISCHARGED BECAUSE THE CERTIFIED QUESTION CONCERNS AN ISSUE WITH ONLY NARROW APPLICATION AND INVOLVES MERE INTRADISTRICT CONFLICT.

This Court accepted jurisdiction in a briefing order issued November 21, 2008, sixteen days after the state filed its notice to invoke. In recent years, this Court has on occasion discharged review after initially accepting jurisdiction in certified question cases. See, e.g., Blocker v. State, 985 So. 2d 1089 (Fla. 2008); State v. Whitby, 975 So. 2d 1124 (Fla. 2008); Woodard v. Jupiter Christian Sch., 972 So. 2d 170 (Fla. 2007); Barnett v. Fla. Dept. of Mgmt. Servs., 953 So. 2d 461 (Fla. 2007); Morrison v. Roos, 944 So. 2d 341 (Fla. 2006); Fla. Dept. of Fin. Servs. v. Ocean Bank, 944 So. 2d 251 (Fla. 2006). Review should likewise be discharged in this case, which involves mere intradistrict conflict on a narrow issue.

The First District certified the following question:

> MAY A DEFENDANT WHO HAS ENTERED A NEGOTIATED PLEA RAISE FOR THE FIRST TIME ON DIRECT APPEAL THE CLAIM THAT HIS CONVICTION VIOLATES THE DECISION IN THOMPSON V. STATE, 887 So.2d 1260 (Fla. 2004)?

Bruce v. State, 993 So. 2d 155, 156 (Fla. 2008). Thompson concerned an amendment to section 322.34(2), Florida Statutes (1996), which made knowledge that one’s license was suspended or revoked an element of the crime of driving while license suspended (DWLS). As a consequence, convictions for DWLS

violations that occurred before the October 1, 1997, effective date of the amendment lack the knowledge element necessary to make them predicate offenses that convert a subsequent violation into a felony. Thompson, 887 So. 2d at 1265-66. The certified question asks whether a violation of the holding in Thompson is fundamental error.

The answer to this question will affect few cases. It will control only (1) felony DWLS prosecutions (2) that were obtained via negotiated plea of guilty or no contest, and (3) that rest on one or more prior DWLS convictions for offenses committed before Oct. 1, 1997. Apart from the First District opinion in this case, Thompson has been cited in only two supreme court or district court opinions involving felony DWLS prosecutions. In the first, Marvin v. State, 907 So. 2d 687 (Fla. 1st DCA 2005), the state stipulated to error under Thompson, and there is no mention of a negotiated plea. The second is a Thompson pipeline case which, like this case, involved a negotiated plea in which the issue was not preserved for appeal. Bryan v. State, 862 So. 2d 822, 823 (Fla. 5th DCA 2003). Nonetheless, on remand from this Court's mandate to reconsider its decision affirming the felony conviction in light of Thompson, the Fifth District ordered the felony DWLS reduced to a misdemeanor. Bryan v. State, 905 So. 2d 120 (Fla. 2005), on remand, 908 So. 2d 584 (Fla. 5th DCA 2005). Bryan is consistent with the First District's decision in this case.

The question certified by the First District in this case is not ripe for an answer by this Court. The question concerns the effect of an 11-year-old revision of section 322.264, Florida Statutes, on a negotiated guilty or no contest plea to a new felony DWLS charge resting in part on a prior DWLS conviction for conduct before the revision. This scenario arises infrequently at most and should soon recede entirely into the past. Further, only the First District in this case and the Fifth District in Bryan have issued opinions in cases with this specific scenario, and have reached the same result. If another district disagrees with the First District decision in this case, it may certify conflict. However, at this point, the certified question implicates neither interdistrict conflict nor a frequently recurring scenario in the state's criminal justice system.

It is acknowledged that the First District's discussion of Miller v. State, 988 So. 2d 138 (Fla. 1st DCA 2008), suggests a concern broader than the certified question: whether a negotiated plea to any crime precludes relief, on grounds of fundamental error, when the facts do not support the charge. However, even on that question, the only discordant note comes from within the First District, first in Judge Allen's dissent in Miller, 988 So. 2d at 140, then in the panel decision in this case, which was authored by Judge Thomas with Judges Barfield and Allen concurring. The panel cited no precedent from other districts supporting the state's position. Regarding intradistrict conflict, this Court has stated: "We would expect

that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing." In re Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Fla. Rules of Appellate Procedure, 416 So. 2d 1127, 1128 (Fla. 1982). However, rather than resolve the intradistrict conflict en banc under Florida Rule of Appellate Procedure 9.331(c), the First District opted for the less favored alternative of a certified question.

If the First District remains divided on whether a negotiated guilty plea to a crime that did not take place is fundamental error, it can resolve the intradistrict conflict en banc. At this point, in the absence of an interdistrict split on the question, this Court's energies may be better focused elsewhere. Discharge is appropriate.

II. A NEGOTIATED GUILTY PLEA TO FELONY DRIVING WHILE LICENSE SUSPENDED THAT INDISPUTABLY LACKS THE ESSENTIAL ELEMENT OF A VALID PREDICATE CONVICTION CONSTITUTES FUNDAMENTAL ERROR.

Standard of review: The certified question and corresponding issue in this case require a determination of law based on fixed facts, and are therefore addressed de novo. Williams v. State 957 So. 2d 595, 598 (Fla. 2007).

Merits: "[T]he Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." Fiore v. White, 531 U.S. 225, 228-29 (2001) (citing Jackson v. Virginia, 443 U.S. 307, 316 (1979), and In re Winship, 397 U.S. 358, 364 (1970)). In Fiore, the Court ruled that a Pennsylvania conviction for operating a hazardous waste facility without a permit violated due process after the Pennsylvania Supreme Court ruled that the statute did not apply to persons who merely exceed the scope of a permit. Because the state conceded that Fiore did in fact possess a permit, he could not be convicted "for conduct that [the state's] criminal statute, as properly interpreted, does not prohibit." 531 U.S. at 228.

Long before Fiore, Florida's courts followed the same rule, even when the defect was first identified on appeal. In Troedel v. State, 462 So. 2d 392 (Fla. 1984), this Court reached the validity of separate burglary convictions on evidence showing commission of only one crime "because we believe that a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental

error." Id. at 399. In K.A.N. v. State, 582 So. 2d 57 (Fla. 1st DCA 1991), the First District reversed a delinquency adjudication for escape from a juvenile detention facility because the facility's restrictiveness level did not meet the definition of lawful custody, an element of the crime. The court concluded that the issue was preserved, but added that "even if that were not so, nevertheless we would be compelled to consider this argument under the doctrine of fundamental error" because "a conviction in the absence of a prima facie showing of the crime charged is fundamental error that may be addressed by the appellate court even though not urged below." Id. at 59. In Nelson v. State, 543 So. 2d 1308 (Fla. 2d DCA 1989), the Second District reversed a conviction for resisting an officer without violence because the defendant's mere flight from the approaching officer did not constitute the offense of resisting and "it would be fundamental error not to correct on appeal a situation where Nelson stands convicted of a crime that never occurred." Id. at 1309.

A plea of guilty or no contest does not waive the due process violation that results from conviction of a crime that never occurred. The lead Florida case on this point is Dydek v. State, 400 So. 2d 1255 (Fla. 2d DCA 1984). There the defendant pled no contest to possession of cocaine and possession of drug paraphernalia, both as charged. The paraphernalia charge rested on Dydek's possession of a cigarette case containing items, one of more of which may

themselves have been drug paraphernalia. Finding fundamental error, the Second District reversed the paraphernalia conviction because the cigarette case could not have been "used for administering any controlled substance" as alleged under section 893.13(3)(a)4, Florida Statutes (1979). The appellate stated it could "think of no error more fundamental than the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged." Id. at 1258.

In Button v. State, 641 So. 2d 106 (Fla. 2d DCA 1994), the Second District applied this principle to a negotiated plea. In 1990, facing seven counts of sexual battery on a child under 12, Button pled no contest to three counts of attempted sexual battery as a lesser included offense. The state voluntarily dismissed the remaining counts, and Button received a negotiated 30-year sentence. Later, in a belated appeal, he asserted that one of the convictions rested on acts that did not meet the definition of either sexual battery or attempted sexual battery in 1972, when the acts occurred. Id. at 108. Citing Dydek, the court agreed:

> A defendant may not be convicted, even if he pleads nolo contendere, in the absence of a prima facie showing of the elements of the crime charged. Button could not have been convicted, on the facts before the trial court, of attempted sexual battery as it existed under the law in effect at the time of his crime.

Id. (cite omitted).

Under Dydek and Button, whose due process foundations were later reinforced in Fiore, the First District's reversal of Bruce's conviction should be

approved. His guilty plea to a felony DWLS which could not have been felony, in exchange for the state's dismissal of a second felony DWLS precluded by double jeopardy and a misdemeanor DUI, with no sentence agreement, did not waive the due process violation.

This result is consistent with Bryan v. State, 908 So. 2d 584 (Fla. 5th DCA 2005), discussed in the preceding point. In an appeal from probation revocation, Bryan challenged, on the same grounds as this case, a felony DWLS conviction obtained via negotiated plea. Bryan v. State, 862 So. 2d 822, 823 (Fla. 2005). The Fifth District affirmed the probation revocation, id. at 824, but this Court ordered reconsideration in light of Thompson v. State, 887 So. 2d 1260 (Fla. 2004). Bryan v. State, 903 So. 2d 120 (Fla. 2005). On remand, the Fifth District reversed the conviction for felony DWLS and ordered Bryan resentenced for the misdemeanor version of the offense. Bryan v. State, 908 So. 2d at 584. Bryan received relief; in the interests of justice, Bruce should too.

The panel below and Judge Allen in Miller based their conclusion that a negotiated plea should waive the due process violation in this case on Novaton v. State, 634 So. 2d 607 (Fla. 1994). See Bruce, 993 So. 2d at 156; Miller, 988 So. 2d at 140 (Allen, J., dissenting). Novaton's holding that a double jeopardy violation may be waived by a negotiated plea should not be extended to the due process violation at issue here. As Judge Wolf noted in Miller, Novaton holds that

a negotiated plea waives the right not to receive dual sentences for crimes that violate double jeopardy. 988 So. 2d at 139. In the case of multiple convictions or sentences, the constitutional protection against double jeopardy prevents only duplication unintended by the Legislature. See Gordon v. State, 780 So. 2d 17 (Fla. 2001) ("The prevailing standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature intended to authorize separate punishments for the two crimes.").[1] Moreover, in Novaton and Guynn v. State, 861 So. 2d 449 (Fla. 1st DCA 2003), cited in Judge Allen's dissent in Miller and the majority opinion in this case below, the pleas waiving the double jeopardy violations were for specific sentences. Novaton, 634 So. 2d at 608; Guynn, 861 So. 2d at 450. Even if the redundant offenses were pared away, the remaining convictions—for burglary, robbery, and aggravated battery with a firearm in Novaton, and for dealing in stolen property in Guynn--would have authorized prison sentences.

In contrast, the denial of substantive due process that results when the defendant pleads guilty to a crime he could not have committed goes to the foundations of our criminal justice system because it results in criminal punishment for noncriminal conduct. It is not merely a matter of punishment

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1. This standard was set out in Blockburger v. United States, 284 U.S. 299 (1932), and is codified at section 775.021(4), Florida Statutes. See Gordon, 780 So. 2d at 19.

beyond that intended by the Legislature for a crime or crimes. Unlike a Blockburger violation, when a defendant is convicted of a crime that did not occur, the state has no authority to exact any punishment whatsoever. This is the consistent message of cases such as Troedel, K.A.N., Nelson, Dydek, and Button on the state level, and Fiore, Jackson, and Winship on the national level. This principle should not be abrogated by analogy to waiver-by-plea of the different and less substantial protections of the Blockburger rule.

Similarly, no analogy should be drawn to the situation in which a defendant pleads guilty or no contest to a lesser included offense that could not have occurred, as in Hoover v. State, 530 So. 2d 308 (Fla. 1988), on which the state relies. There, the defendant plea-bargained a charge of sexual battery on a child under 12 down to sexual battery on a child over 11, which he could not possibly have committed because of the child's age. The First District reversed sua sponte on a finding of fundamental error. Both Hoover and the state challenged the district court decision, which this Court quashed in reliance on its holding in Ray v. State, 403 So. 2d 956 (Fla. 1981), that a defendant could be convicted of an improper lesser included offense on an instruction he requested or relied on at trial. In a brief opinion questioning the First District's action in raising the issue sua sponte while ignoring a challenge to the trial court's authority to impose an upward departure sentence, the Court in Hoover extended Ray to a plea to an invalid but

related lesser charge "knowingly and voluntarily" entered into by the defendant. 530 So. 2d at 309.

In addition to its unusual posture, Hoover is inapplicable because it rests on an assumption that the defendant "understands and acquiesces . . . to the improper procedure" and therefore the plea to the invalid lesser included offense was made "voluntarily and knowingly." 530 So. 2d at 308-09. The record in this case contains no indication that Bruce knew he was pleading to a felony version of the offense when he could only have committed a misdemeanor. Constitutional rights can be waived, but only if done so voluntarily, knowingly, and intelligently. Johnson v. State, 994 So. 2d 960, 968 (Fla. 2008). The plea colloquy in this case does not establish a knowing, voluntary, and intelligent waiver by Bruce of his right not to be convicted of a crime he could not have committed.[2]

The state argues that this error is not cognizable under Florida Rule of Appellate Procedure 9.140(b)(2), which limits appeals following guilty or no-contest pleas to lack of subject-matter jurisdiction, violation of the plea agreement or an involuntary plea if either ground is preserved by a motion to withdraw the plea, a preserved sentencing error, or "as otherwise provided by law." The First District correctly denied the state's motion to dismiss Bruce's appeal raising the

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2. The absence of a knowing, voluntary, intelligent waiver of the due process defect renders Bruce's plea subject collateral attack if and when his conviction becomes final.

same claim below. 993 So. 2d at 156. The constitutional prohibition on conviction of a crime that the record affirmatively demonstrates the defendant could not have committed supersedes rule 9.140(b)(2)(A), or at the very least constitutes grounds for appeal "otherwise provided by law" under rule 9.140(b)(2)(A)(ii)e. This issue was properly raised for the first time on direct appeal.

The final consideration is the appropriate relief. As noted, the Fifth District in Bryan remanded for reduction of the offense to a first-degree misdemeanor, and Bruce requested the same relief in the First District. However, the First District remanded with directions to give the state the . option to have the defendant withdraw the plea and take the case to trial, probably because Bruce faced additional charges while Bryan was charged with only one count. 862 So. 2d at 823. Subject to the necessity of dismissing one of the two DWLS counts on double jeopardy grounds, this distinction justifies the First District's directions on remand.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the respondent requests that this Court approve the decision of the First District in this case and answer yes to the certified question whether a defendant who has entered a negotiated plea may raise for the first time on direct appeal the claim that his conviction violates Thompson.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Donna A. Gerace, Counsel for Petitioner, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399, ____ day of January, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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