IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC08-2127

v.

ROBERT GENE BRUCE,

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, ROBERT GENE BRUCE, 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 charged Respondent with one count of driving while license suspended as a habitual offender, a third degree felony; one count of driving while license suspended, canceled, or revoked as a third offense, a third degree felony, and; one count of driving while under the influence of intoxicants, a first degree misdemeanor. (R 2-3). On the second count, the State alleged the two prior convictions occurred on June 7, 1996, and April 6, 2004. (R 2).

On April 17, 2007, Respondent, while represented by an assistant public defender, entered into a plea agreement. (R 9-14). Based on the agreement, Respondent pled to count two, driving while license suspended, canceled, or revoked as a third offense. (R 3). Respondent specifically wanted to plead to count two. (R 3). In exchange for the guilty plea, the State agreed to nolle prosequi count one and count three. The trial court and State noted that there was sufficient evidence to prosecute the Respondent on these counts. (R 3). The trial court accepted the plea and adjudicated Respondent guilty on count two. (R 14).

On May 16, 2007, after a presentence investigation was conducted, the Respondent was sentenced to three years incarceration with credit for 49 days served. (R44).

Respondent filed a direct appeal in the First District Court of Appeal arguing that his felony conviction of knowingly driving while license suspended as a third-time offender should be reduced because it relied on a prior offense for which knowledge was not an element of the crime.

In its opinion filed October 29, 2008, the District Court reversed the conviction based on Thompson v. State, 887 So.2d 1260 (Fla. 2004). The District Court however certified the following question as a matter of great public importance:

> 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)?

The State timely filed notice to invoke jurisdiction of the Florida Supreme Court. This Court has accepted jurisdiction and this appeal follows.

SUMMARY OF ARGUMENT

A defendant, who has entered a negotiated plea, may not 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), because the claim does not meet any of the exceptions under Florida Rule of Appellate Procedure 9.140(b)(2).

A respondent in Bruce's position is not without a remedy, however. After sentencing, a defendant who unwittingly enters the same plea the Respondent did may seek to withdraw the plea as being involuntary. Fla. R. App. P. 9.140(b)(2)(A)(ii)(c).

An agreement to a specific sentence or a specific sentencing benefit is a key element distinguishing a bargained-for plea agreement from a general one. This Court has previously held that it is not fundamental error for a defendant to enter a negotiated plea to a charge even though the evidence shows the defendant did not commit the offense, if a defendant voluntarily and knowingly enters into the plea. Having accepted the benefits of the plea agreement, Respondent, cannot, any more than any other contracting party, be relieved of the burden of his contract.

ARGUMENT

ISSUE I

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)?

Standard of Review

The standard of review to determine if there is a right to appeal from a guilty plea where no issues have been reserved and no motion to withdraw the plea has been filed is a matter of law which is reviewed de novo.

Argument

Before the First District Court of Appeal, Respondent sought direct review of his conviction based on a negotiated plea of guilty entered on April 7, 2007. Respondent argued his conviction for felony driving while license suspended or revoked (DWLS) violated his constitutional right to due process based on this Court's holding in Thompson v. State, 887 So.2d 1260 (Fla. 2004). (IB 4).

In Thompson, the State charged the defendant with felony driving while license suspended (DWLS) which is committed when a defendant drives while his license is suspended or revoked and has twice been previously convicted of the same offense. Section 322.34(2)(c), Florida Statutes. The State predicated the

instant charge on Thompson's two previous convictions for DWLS which occurred before the statute was amended in October 1997 to include a knowledge element, requiring the State to prove the defendant knew, at the time he was driving, his license was suspended or revoked.

Thompson entered a plea of guilty to felony DWLS and did not appeal. In a motion for post-conviction relief, Thompson, however, challenged his felony conviction arguing his two pre October 1, 1997 predicate DWLS convictions were not qualifying offenses so as to permit his conviction for felony DWLS.

This Court agreed reasoning that the 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. Because the State did not, and could not, prove that Thompson's predicate convictions included the knowledge element, this Court concluded his conviction failed to satisfy federal constitutional due process requirements. Thus, this Court reversed. Thompson, 887 So.2d 1260, 1265-1266 (Fla. 2004).

Thompson differs from the instant case in two material respects. First, in Thompson, this Court did not consider whether a defendant could challenge, on direct appeal, his conviction for felony DWLS entered as a result of a ***negotiated***

plea. Next, Thompson did not seek direct review of his guilty plea, instead, challenging his conviction in a motion pursuant to Florida Rules of Criminal Procedure 3.850.

This Court should decline to extend Thompson to a direct appeal from a negotiated plea. First, a defendant who enters a negotiated plea waives his right to appeal, except under certain very narrow circumstances. The Florida Legislature has mandated in section 924.051(4), Florida Statutes that:

> (4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence.

The Florida Supreme Court interpreted and expressly upheld this provision of law in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996). In conformity to the statute, the Court then rewrote the rules of criminal and appellate procedure to implement the legislative decision that no appeals are permitted from guilty or nolo pleas, including the sentences imposed thereafter, unless the claim of prejudicial error has been first raised in the trial court. Florida Rule of Appellate Procedure 9.140(b)(2) implements section 924.051(4) as follows:

(2) Guilty or Nolo Contendere Pleas.

> (A) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (i) Reservation of Right to Appeal. A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (ii) Appeals otherwise allowed. A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> a. the lower tribunal's lack of subject matter jurisdiction;
> b. a violation of the plea agreement, if preserved by a motion to withdraw plea;
> c. an involuntary plea, if preserved by a motion to withdraw plea;
> d. a sentencing error, if preserved, or
> e. as otherwise provided by law.

The facts of this case show the following:

(1) The appellant did not reserve any dispositive issues pursuant to Rule 9.140(b)(2)(A)(i).

(2) The appellant here does not, and cannot, challenge the subject matter jurisdiction of a circuit court to hear a felony prosecution pursuant to Rule 9.140(b)(2)(A)(ii)a.

(3) The appellant here did not move to withdraw the plea pursuant to Rule 3.170 and cannot appeal pursuant to Rules 9.140(b)(2)(A)(ii)b and 9.140(b)(2)(A)(ii)c.

(4) The appellant here does not, did not, and cannot challenge the sentence imposed pursuant to Rule 9.140(b)(2)(A)(ii)d.

In sum, section 924.051(4) and rule 9.140(b)(2) do not authorize, and expressly prohibit, appeals from guilty pleas under the facts of this case. By entering the negotiated plea of guilty Respondent has waived his right to direct appeal except in the enumerated circumstances.

A respondent in Bruce's position is not without a remedy, however. After sentencing, a defendant who unwittingly enters the same plea as did the Respondent may seek to withdraw the plea as being involuntary. Fla. R. App. P. 9.140(b)(2)(A)(ii)(c). By filing a motion to withdraw plea, the lower tribunal can conduct an evidentiary hearing to elucidate whether the plea was actually knowing and voluntary.

In this case, Respondent did not file a motion to withdraw his plea. Instead, Respondent sought below, after getting the benefit of his bargain in the trial court, to go behind his plea contrary to Florida Rule of Appellate Procedure 9.140(b)(2). Accordingly, this Court should not extend Thompson to cases on direct review where the defendant has waived his right to appeal by entering a negotiated plea.

This Court should also reject any claim that fundamental error creates a "de facto" amendment to Florida Rule of Criminal Procedure 3.170 and Rule of Appellate Procedure 9.140(b)(2). This Court has already held that it is not fundamental error for

a defendant to enter a negotiated plea to a charge in which the evidence shows the defendant did not commit the offense, if a defendant voluntarily and knowingly enters into the plea. Hoover v. State, 530 So.2d 308 (Fla. 1988).

In Hoover, this Court reviewed the First District Court of Appeal's decision holding the trial court committed fundamental error in accepting the defendant's nolo contendere plea to the felony charge of sexual battery of a child over the age of eleven by a person in a position of familial or custodial authority. The defendant was initially charged with the capital felony of sexual battery upon a person less than twelve years of age. The district court's reasoning was based on the undisputed evidence which proved he did not commit sexual battery upon a child over the age of eleven.

Both the State and Hoover challenged the decision arguing that it could not be reconciled with this court's decision in Ray v. State, 403 So.2d 956 (Fla. 1981) where the defendant was charged with sexual battery, but was convicted by a jury of lewd assault as a lesser offense. In affirming the conviction for the improper lesser offense in Ray, this Court stated that

> it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the

> main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action. Hoover at 309.

Based on the reasoning in Ray, this Court overturned the district court's holding in Hoover stating, "if a defendant can be convicted by a jury of an improper lesser included charge, a defendant can also agree to a plea to a related, but not lesser, offense. Hoover. We hold that the acceptance of such a plea agreement is not fundamental error." This Court further held that the plea is valid if the defendant voluntarily and knowingly enters into the plea. Id.

Based on Hoover, Respondent's negotiated plea of guilty does not amount to fundamental error if it was entered knowingly and voluntarily. Negotiated pleas should be presumed to be made knowingly and voluntarily since they are a contract and the rules of contract law are applicable to these agreements. An agreement to a specific sentence or a specific sentencing benefit is a key element distinguishing a bargained-for plea agreement from a general one. Williamson v. State, 859 So.2d 553 (Fla. 1st DCA 2003). This was a bargained-for plea agreement because Respondent gained a sentencing benefit of a reduction in the maximum possible sentence to which he was exposed, avoided having his driver's license suspended for the

DUI charge, avoided having a monetary increase in future car insurance based on the DUI charge, and avoided having additional points on future criminal punishment score sheets because the State nolle prossed two other counts. Having accepted the benefits of the plea agreement, Respondent, cannot, any more than any other contracting party, be relieved of the burden of his contract.

Moreover, a defendant may waive any and all of his constitutional rights including the privilege against compulsory self-incrimination, the right to trial by jury, the right to confront accusers, and the prohibition to double jeopardy, if done knowingly and voluntarily. It is well established that an appeal from a guilty plea should never be a substitute for a motion to withdraw plea. If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and rules of procedure. If the action of the trial court on such a motion is adverse to the defendant, it would be subject to review on direct appeal. Robinson v. State, 373 So.2d 898, 902 (Fla. 1979)(It is worth noting that section 924.051 and rule 9.140(b), are, in large part, codifications and clarifications of extant case law in Robinson v. State , 373 So.2d 898 (Fla. 1979)).

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 933 So. 2d 155, 33 Fla. L. Weekly D2538, should be reversed, and the judgment and conviction 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 Glen P. Gifford, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on _____ day of December, 2008.

Respectfully submitted and served,

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[AGO# L08-1-32034]

CERTIFICATE OF COMPLIANCE

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

_____

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APPENDIX

993 So.2d 155 (Fla. 1st DCA 2008), 33 Florida Law Weekly D2538