IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1489
DCA CASE NO. 3D08-1428

BERNARD JOYNER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

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. Petitioner, Bernard Joyner, 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 instant matter was before the trial court on a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800. Therefore, there was no record on appeal prepared in district court. The citations to the record refer to the index prepared by the Third District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

According to the motion filed by Petitioner, in 2004 the defendant entered into a plea agreement and was sentenced to five years probation for the offense of false imprisonment. (R. 6). See also Joyner v. State, 988 So. 2d 670, 671 (Fla. 3d DCA 2008). On November 28, 2006, Joyner was arrested on a violation of probation. Id. On February 15, 2007, the Defendant signed an agreement specifically granting him credit only for time served from November 29, 2006, to February 15, 2007. (R. 5). The agreement states that:

> [the Defendant] understands and agrees that as part of his plea bargain he would be receiving the following credit for time served (check one and fill in as appropriate):
>
> ☑ from 11- 29, 2006, to 2-15, 2007.
>
> ☐ ____days credit for time served
>
> ☐ **All** credit for time served
>
> ☐ **No** credit for time served.

(R. 5). The form was signed by the defendant, defense counsel, the assistant state attorney, and the judge. (R.5). Joyner received credit for seventy-eight (78) days. (R. 7). Pursuant to the plea, he was sentenced to a two-year incarceration in the Department of Corrections. (R.8).

On October 16, 2007, Joyner filed a motion pursuant to Florida Rule of Criminal Procedure 3.800. (R.6-10). In that motion, he alleged that he was entitled to full credit for time served between his original arrest and sentencing. (R.7). He claimed that he was entitled to 122 additional credit time served. (R. 8-9).

On January 3, 3008, the trial court issued an order denying Defendant's motion to correct illegal sentence, finding that the motion is insufficient to support the relief prayed. (R.4). The trial court also attached the agreement on credit time served. (R. 5). The court did not attach the plea colloquy from the sentencing on probation revocation.

Joyner appealed to the Third District Court of Appeal. See Joyner v. State, 998 So. 2d 670 (Fla. 3d DCA 2008). The Third District Court of Appeal affirmed the denial of additional credit for time served finding that a provision in a plea agreement that credit was to have been awarded only for time served between two specific dates effectively waived any claim to credit for time served before that date. Id. at 673.

The District Court noted that in denying the motion, the circuit court attached a copy of the plea agreement. Id. at 671. The agreement stated that Joyner understand and agreed that as part of the plea bargain he would be

receiving the credit for time served from November 29, 2006, to February 15, 2007. Id. at 671-672. The Third District Court of Appeal recognized that credit for time served may be waived as part of a plea agreement. Id. at 672. The Third District affirmed the denial of relief on the authority of Johnson v. State, 974 So. 2d 1152 (Fla. 3d DCA 2008), finding that as Joyner's agreement provided for credit for time served between two stated dates he was not entitled to credit served before those dates.

Thereafter, Joyner filed for discretionary review in this Court alleging that the Third District's opinion is in express and direct conflict with Davis v. State, 405 So. 2d 418 (Fla. 1981), Reed v. State, 810 So. 2d 1025 (Fla. 2d DCA 2002), Silverstein v. State, 654 So. 2d 1040 (Fla. 4th DCA 1995), and Van Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984). The State of Florida filed a response arguing that the Third District Court of Appeal's opinion in Joyner is not in express and direct conflict with any decisions of this Court or any of the district courts of appeal on the same question of law. This Court stayed the case pending resolution of Rivera v. State, 954 So. 2d 1216 (Fla. 3d DCA 2007). Subsequently, this Court discharged jurisdiction of Rivera.

On April 22, 2009, this Court issued an order to show cause why the decision in Rivera was not controlling on this case. Despite the previous argument

that Rivera was controlling, Petitioner responded that Rivera was not controlling and that this Court should accept jurisdiction based on the aforementioned conflict. In his response, counsel for the Petitioner also acknowledged that Petitioner was no longer incarcerated. On October 2, 2009, this Court accepted jurisdiction of the instant case.

On December 8, 2009, Petitioner filed an initial brief in which he argued:

> A DEFENDANT'S WAIVER OF CREDIT TIME SERVED WILL NOT BE PRESUMED; IT MUST BE KNOWING, INTENTIONAL, AND VOLUNTARY.

(Pet. Brief pg 5).

The State's response follows.

SUMMARY OF THE ARGUMENT

In probation revocation cases, a defendant is generally entitled to credit time served on the original sentence and subsequent sentence. However, such credit is subject to being waived. Here, the written plea agreement effectively waived credits for time served prior to the arrest on the violation of probation. Joyner knowingly signed a form, which made it clear, that he would not be receiving any credit for time served prior to his arrest on the violation of probation. Therefore, Petitioner is not entitled to additional credit for time served beyond that specified in the agreement.

Petitioner also requests that this Court "apply the credit due to Mr. Joyner for the 122 days he spent in jail upon his initial arrest." However, despite Petitioner's urging otherwise, he is not entitled to this remedy. Petitioner entered into a plea agreement contingent on specific terms. If Petitioner is unhappy with his sentencing package, the proper remedy is to seek the withdrawal of the plea in its entirety.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN FINDING THAT THE WRITTEN PLEA AGREEMENT CONCLUSIVELY REFUTED THE RULE 3.800(A) MOTION, AS THE WRITTEN AGREEMENT WAIVED ANY FURTHER CREDIT FOR TIME SERVED.

In probation revocation cases, a defendant is generally entitled to credit time served on the original sentence and subsequent sentence. However, such credit is subject to being waived. In the instant case, the written plea agreement effectively waived credits for time served prior to the arrest on the violation of probation. Accordingly, the written agreement refutes the allegations raised in the Rule 3.800(a) motion.

Despite Petitioner's arguments to the contrary, Petitioner agreed to 78 days credit for time served as a condition of a plea agreement and therefore is not entitled to relief. He knowingly signed a form, which made it clear, that he would not be receiving any credit for time served prior to his arrest on the violation of probation. "A plea agreement is a contract and the rules of contract law are applicable to plea agreements." Garcia v. State, 722 So. 2d 905, 907 (Fla. 3d DCA 1998) (citing State v. Frazier, 697 So. 2d 944, 945 (Fla. 3d DCA 1997)); see also A.D.W. v. State, 777 So. 2d 1101, 1104 (Fla. 2d DCA 2001) (acknowledging that

"plea agreements are controlled by contract law"). A defendant is entitled to credit for all time served in county jail before the sentence. Fl. Stat. 921.161 (2005). A sentence that does not mandate credit for time served would be illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time served. State v. Mancino, 714 So. 2d 429, 433 (Fla. 1998). However, a party may waive any right to which he is legally entitled under the Constitution, a statute, or a contract. State, Department of Health & Rehabilitative Services v. E.D.S. Federal Corporation, 631 So. 2d 353 (Fla. 1st DCA 1994). Indeed, a defendant can waive credit for time served as part of a plea agreement. Silverstein v. State, 654 So. 2d 1040 (Fla. 4th DCA 1995); Prangler v. State, 470 So. 2d 105 (Fla. 2d DCA 1985).

Black's Law Dictionary defines waiver as "the voluntary relinquishment or abandonment — express or implied — of a legal right or advantage." Black's Law Dictionary (8th ed. 2004). This Court has defined it as "the voluntary and intentional relinquishment of a known right or conduct which implies [such relinquishment]." Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla.2005)(emphasis added). However, "the common definition of waiver may lead to the incorrect inference that the promisor must know his legal rights and must intend the legal effect of the promise. But ... it is sufficient if he has

reason to know the essential facts." Restatement (Second) of Contracts § 84 (1981).

Florida courts have recognized that three circumstances give rise to a waiver: (1) the existence of a right which may be waived; (2) actual or constructive knowledge of the right; and (3) the intent to relinquish the right. See Bueno v. Workman, 20 So. 3d 993, 998 (Fla. 4th DCA 2009) citing LeNeve v. Via S. Fla., L.L.C., 908 So. 2d 530, 535 (Fla. 4th DCA 2005); see also, Capital Bank v. Needle, 596 So. 2d 1134, 1138 (Fla. 4th DCA 1992). Proof of these elements "may be express, or implied from conduct or acts that lead a party to believe a right has been waived." See Taylor v. Kenco Chem. & Mfg. Corp., 465 So. 2d 581, 587 (Fla. 1st DCA 1985). Contrary to Petitioner's assertion, the Third District Court of Appeal has not modified the law concerning the waiver of additional credit for time served by creating what Petitioner refers to as an "implicit intent waiver exception."

Indeed, Joyner knowingly waived credit to any additional time by entering into an agreement which limited the amount of credit for time served that he would receive. On February 15, 2007, Petitioner signed an agreement specifically granting him credit only for time served from November 29, 2006, to February 15, 2007. Petitioner received these seventy-eight (78) days credit. The agreement

states that:

> "[the Defendant] understands and agrees that as part of his plea bargain he would be receiving the following credit for time served (check one and fill in as appropriate):
>
> ☑ from 11- 29, 2006, to 2-15, 2007.
>
> ☐ ____days credit for time served
>
> ☐ **All** credit for time served
>
> ☐ **No** credit for time served.

(Emphasis in original).

Only the first box was checked. Clearly, at the time he signed the agreement, Joyner was aware that he was only being credited with the period from November 29, 2006, to February 15, 2007 as the box for "all" credit for time served was not checked off. The form was signed by the defendant, defense counsel, the assistant state attorney, and the judge. The terms of the agreement were clear and unambiguous. In signing this agreement, Joyner knew that he was not being awarded "all" credit for time served.

Petitioner attempts to argue that his waiver was not knowingly and voluntary. He argues that a defendant cannot waive a right that he does not know about. (Pet. Brief. Pg 6). This claim is not preserved and is also beyond the scope

of a proceeding pursuant to Florida Rule of Criminal Procedure 3.800(a). In his initial motion in the Circuit Court, and his appeal to the District Court, the Petitioner's argument was simply that he was entitled credit to an additional 122 days. However, he now argues "lack of awareness." These are two separate and distinct arguments. Petitioner never presented this argument to the Circuit or the District Court therefore this is not properly before this Court.

Moreover, even if the "lack of awareness" argument was preserved, it is not cognizable in a Rule 3.800(a) motion. Claims filed pursuant to Florida Rule of Criminal Procedure 3.800(a) must be apparent on the face of the record. Apparent from the face of the record might entail a question of the sufficiency of a judge's inquiry and colloquy, but awareness of a defendant goes beyond that - what his attorney told him; what he knew from prior experience in the criminal justice system. These inquires would entail evidentiary determinations and are therefore beyond the scope for 3.800(a). Fla. R. Crim. P. 3.800(a); Renaud v. State, 926 So. 2d 1241 (Fla. 2006)("A requirement for relief under Florida Rule of Criminal Procedure 3.800(a) is 'that the court records demonstrate on their face an entitlement to ... relief.' This rule does not contemplate the necessity of an evidentiary hearing.").

Nevertheless, if this Court does find that this claim is preserved, Petitioner

is not entitled to relief. This Court has defined "knowingly" as "done by a person who is aware or *should be aware* of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." State v. Harden, 938 So. 2d 480, 491 (Fla. 2006). Joyner signed an agreement awarding him jail credit from the period from November 29, 2006, to February 15, 2007. The form had the option of checking the box awarding him all credit for time served. However this option was not marked. Joyner knew that there was the option to award him full credit for time served, but the State only offered credit for time served between two specific dates. The record establishes the Petitioner's intent to waive a portion of his accrued jail time. It is clear that Joyner was aware that there was an option to receive all credit for time, but he was receiving less than that.

In his brief, Petitioner also argues that the Third District Court of Appeal has modified the well-established waiver rule to include an implied waiver exception when the a defendant agrees on a plea to a stipulated amount of credit for time served, even though the defendant's entitlement to and/or waiver of the credit is not discussed in the record. It is his position that the Third District Court of Appeal is in conflict with every other district court. However, the cited cases are all distinguishable.

Here, unlike the cited cases from the other district courts, the defendant

signed a plea agreement that demonstrated a voluntary relinquishment of a known right. The Third District Court of Appeal held "that a provision in a plea agreement that the defendant is to be awarded credit for time served from a specific date effectively waives any claim to credit for time served before that date." Despite Petitioner's urging otherwise, this holding is not in express or direct conflict with the other district courts of appeal.

For example, in Davis v State, 968 So. 2d 1051, 1052 (Fla. 5th DCA 2007), the Fifth District considered whether a plea agreement statement providing that "credit for time served as 7/31/2006 is 1,531 days" waives entitlement to additional days of jail credit. The Fifth District Court of Appeal found that the statement was not conclusive evidence that the defendant knowingly and voluntarily waived jail credit to which he would otherwise be entitled to. The Fifth District remanded the case to the trial court with instructions to either grant the motion or attach portions of the record conclusively refuting the inmate's claim. Davis goes to "a certain amount of credit" – e.g., a number of days and the Third District's opinion speaks to a written plea agreement for credit for time served between specific dates.

Similarly, Petitioner cites to Silverstein v. State, 654 So. 2d 1040 (Fla. 4th DCA 1995). As with Davis, Silverstein is factually distinguishable inasmuch as it

allowed a certain number of days of credit for time served – 127 days – whereas the Third District's opinion allowed for credit for time served from a date certain. Furthermore, the holding in Silverstein is that where the waiver of credit is not shown on the record, it will not be presumed. Silverstein, 654 So.2d at 1041. In the instant case, Petitioner signed a plea agreement that demonstrated on the record a voluntary relinquishment of a known right.

At least one other District Court has held the same as the Third District Court of Appeal. Recently, in Hagan v. State, 35 Fla. L. Weekly D83 (Fla. 1st DCA Dec. 31, 2009), the First District Court of Appeal found that a defendant knowingly and voluntarily waived his right to receive credit for time served. In Hagan, the defendant signed a plea agreement "expressly stipulating that he would receive jail credit for time served since October 2, 2007, in exchange for his guilty plea." Id. The defendant later claimed that he did not knowingly waive his right to receive credit for time served prior to that date. The court found that "[t]he inclusion of specific language indicating the specific date from which the defendant's credit for time served would count towards his current sentence is sufficient to demonstrate he knowingly and voluntarily waived his right to have any credit he may have accrued prior to that date count towards his current sentence." Id. Indeed, none of the cases relied upon by the Petitioner involve a

written form, signed by a defendant, in which the court conspicuously did not check off the unqualified option for all credit for time served.

Finally, as a remedy, Petitioner requests that this Court "apply the credit due to Mr. Joyner for the 122 days he spent in jail upon his initial arrest." (Pet. Brief pg. 14). However, despite Petitioner's urging otherwise, he is not entitled to this remedy. Petitioner entered into a plea agreement contingent on specific terms. The signed written agreement provided credit only from the last booking date and made it clear, on its face, that the State was not providing any other credit. If Petitioner is unhappy with his sentencing package, the proper remedy is to seek the withdrawal of the plea in its entirety. The State would then be free to prosecute the violation of probation and seek whatever sentence the trial court might impose for the violation of probation, which might have been considerably greater. Instead, of seeking withdrawal of his plea, Petitioner is seeking to keep the benefit of a plea/sentence offered by the State and to piggy back additional benefits onto it. Based on the foregoing, Petitioner's signed a plea agreement to credit for time served for time served between two stated dates. The plea agreement was a contract between the State and the Petitioner. The terms of that agreement were clear and unambiguous. The record reflects that the waiver was knowing and voluntary. Petitioner should not be entitled to additional credit for time served

beyond that specified in the agreement. To do so, under these circumstances, would render plea agreements meaningless.

If this Court disagrees with the Third District Court of Appeal, the proper remedy is to remand the matter back to the trial court for further proceedings or for the trial court to attach documents that refute the defendant's claims. Indeed, the plea colloquy was not appended to the lower court's order. The plea colloquy could very well have gone beyond the written waiver form, as it is conceivable that the lower court expressly advised the defendant that as part of the plea, credit for prior time served was being waived. However, as the plea colloquy was not appended to the lower court's order, it is beyond the scope of review in this appeal. See Langdon v. State, 947 So. 2d 460 (Fla. 3d DCA 2006); Friss v. State, 881 So. 2d 38 (Fla. 5th DCA 2004) ("It is not the defendant's burden to attach portions of the record showing entitlement to relief, but it is the trial court's responsibility to attach portions conclusively refuting the claim."); see also Futrell v. State, 932 So. 2d 642 (Fla. 4th DCA 2006); McClain v. State, 629 So. 2d 320, 321 (Fla. 1st DCA 1993)("A trial court's failure to attach portions of the record refuting the allegations of a rule 3.850 motion cannot be remedied on appeal by the state's attempt to furnish material refuting the prisoner's claims.")

CONCLUSION

Based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was mailed this ____th day of FEBRUARY 2010, to Shannon P. McKenna, Assistant Public Defender, NW 14th Street, FL 33125.

_____
NIKOLE HICIANO
Assistant Attorney General

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Brief of Respondent on Jurisdiction has been typed in Times New Roman, 14-point type.

_____
NIKOLE HICIANO
Assistant Attorney General