IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-418

Lower Tribunal No. 3D07-2418

ANDREA JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

ANSWER BRIEF OF RESPONDENT 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 "S.R." refers supplemental record on appeal filed in the Third District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

On October 15, 2002, the Petitioner was charged by information with robbery with a firearm in violation of § 812.13(2)(A), *Fla. Stat.* and § 775.087, *Fla. Stat.* (count one) and possession of a firearm by a convicted felon in violation of § 790.23, *Fla. Stat.* (count two). (S.R. 11 - 14).

Pursuant to a guilty plea, judgment was entered against Petitioner for counts one and two. (S.R. 17 – 19). Petitioner was placed on probation for a period of four years with the special condition that he attend and complete boot camp. (S.R. 15 – 16).

On September 27, 2005, an affidavit of violation of probation was filed alleging that Petitioner violated his probation by 1) committing new offenses of theft and malicious destruction of property; 2) failing to submit monthly reports; and 3) failing to pay costs of supervision. (S.R. 29). Petitioner was booked on the probation violation charges on November 14, 2005. (S.R. 50).

On April 25, 2006, a hearing was held on the affidavit of violation of probation. (S.R. 47). Defense counsel stated:

> Mr. Johnson has indicated to me he is incline to accept the State's offer. He wants to inquire of the Court if you would give him a two-day furlough to put his

> affairs in order, and then to report back on Thursday to start his four year sentence, and the agreement also would be that he would get his credit from his last booking date, from November 14, 2005.

(S.R. 50). Petitioner admitted to the violation of probation and was colloquied by the trial court. (S.R. 51). The trial court stated: "Yes, all credit time served from the last booking date of November 14, 2005?" (S.R. 54). The Defendant responded "Yes." *Id.*

The Petitioner signed an agreement on credit for time served in which he specifically agreed to "all credit for time served from 11/14/05." The agreement contained a form that stated:

> I understand and agree that, as part of my plea bargain I will be receiving the following credit for time served (check one and fill in as appropriate):
>
> [ ] from ____, 200 to ____, 200
> [ ] ____ days credit for time served
> [X] all credit for time served from 11/14/05
> [ ] no credit for time served

(S.R. 33). The agreement was signed by the defendant personally, defense counsel and the assistant state attorney on the same date as the probation violation hearing.

On April 25, 2006, an order of revocation of probation was entered revoking Petitioner's probation for the reasons stated in the affidavit of violation of probation. (S.R. 30). Petitioner was sentenced to four years incarceration with jail credit "FROM 11/14/05". (S.R. 31 – 32).

On April 16, 2007, Petitioner filed a motion to correct illegal sentence in which he argued: "Pursuant to Section 921.165, Florida Statutes, a Defendant shall be allowed credit for all time he or she spend in the custody of the Florida Department of Corrections awaiting trial… Violation of probation is illegal because he was not granted credit for the time served on the incarcerative portion of his original sentence." (S.R. 34 – 37).

On July 5, 2007, the trial court entered an order denying the Petitioner's motion in part and granting the Petitioner's motion in part as follows:

> 1. On November 5, 2002, the defendant pled guilty to one count of Armed Robbery with a Firearm and one count of Possession of a Firearm by a Convicted Felon and was sentenced to bootcamp followed by probation.
>
> 2. The defendant subsequently violated his probation and on April 25, 2006, the defendant entered a plea to (4) years State Prison with credit time served from November 14, 2005. See Attached

> Transcript of Plea Colloquy dated April 25, 2006.
>
> 3. The defendant alleges that he is entitled to more credit then what he agreed to as part of the negotiated plea offer.
>
> 4. As the defendant made a knowing, voluntary and intelligent plea following advise from counsel, he is only entitled to the jail credit from the agreed upon date of November 14, 2005.
>
> For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that the Department of Corrections is to give the defendant ALL CREDIT FOR TIME SERVED from the agreed upon last booking date of November 14, 2005. The defendant's request for any additional credit for time served is DENIED.

(S.R. 44 – 46). The trial court attached the transcript of the plea colloquy and the written agreement on credit for time served to its order. (S.R. 47 – 55). The trial court entered an order correcting Petitioner's sentence to include "CREDIT TIME SERVED FROM 11/14/05, IN THE ABOVE STYLED CAUSE." (S.R. 43).

The Petitioner appealed the trial court's denial of his motion to correct illegal sentence. Counsel was appointed and filed an initial brief in which she argued:

> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT CREDIT FOR TIEM SERVED IN BOOT CAMP WHERE BOOT CAMP IS THE FUNCTIONAL EQUIVALENT OF JAIL AND CONSEQUENTLY, THE CASE MUST BE REVERSED AND REMAND TO THE TRIALCOURT WITH DIRECTIONS TO COMPUTE AND

> AWARD HIM BOOT CAMP CREDIT, AS WELL AS CREDIT FOR TIME SERVED IN JAIL AS A SPECIAL CONDITION OF PROBATION AND AWAITING TRANSFER TO BOOT CAMP.

On February 13, 2008, the Third District Court of Appeal affirmed the denial of Petitioner's motion to correct illegal sentence as follows:

> Following Hines v. State, 906 So.2d 1137 (Fla. 3d DCA 2005), we again hold 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. See also Rivera v. State, 954 So.2d 1216 (Fla. 3d DCA 2007), review granted, 968 So.2d 557 (Fla. 2007); but cf. Fulcher v. State, 875 So.2d 647, 649 (Fla. 3d DCA 2004)(Cope & Wells, JJ., specially concurring), case dismissed, 890 So.2d 1114 (Fla. 2004); Ryan v. State, 837 So.2d 1075 (Fla. 3d DCA 2003); Sommers v. State, 829 So.2d 379, 380 n.1 (Fla. 3d DCA 2002). In this case, the defendant's agreement in writing and in the plea colloquy to having violated probation in return for a four-year state prison sentence with "all credit for time served from 11/14/05," precludes his present claim for time spent in boot camp in 2002 after he was originally charged, even though he would have otherwise been entitled to that credit. See Obando v. State, 867 So.2d 645 (Fla. 3d DCA 2004); Griffin v. State, 838 So.2d 1218 (Fla. 3d DCA 2003).

Petitioner filed a brief on jurisdiction in this Court in which it argued:

> THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH

> THE DECISIONS IN DAVIS v. STATE, 968 So.2d 1050 (FLA. 5th DCA 2007), SILVERSTEIN v. STATE, 654 So.2D 1040 (FLA. 4th DCA 1995), REED v. STATE, 810 So.2d 1025 (FLA. 2d DCA 2002), AND VAN ELIS v. STATE, 455 So.2D 1065 (FLA. 1st DCA 1984), ON THE ISSUE OF IMPLIED WAIVER OF CREDIT FOR TIME SERVED, AND THIS ISSUE IS PENDING IN THIS COURT IN RIVERA v. STATE, 968 So.2D 557 (FLA. 2007)(FLA.S.CT.NO: SC07-936).

This Court stayed the case pending resolution of *Rivera*. Subsequently, this Court discharged jurisdiction of *Rivera*. *See, Rivera v. State*, 34 Fla. L. Weekly S244 (Fla. Feb. 26, 2009).

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. 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."

Respondent's brief follows.

SUMMARY OF THE ARGUMENT

A criminal defendant may waive credit for time served. In the instant case, Petitioner clearly waived any and all credit for time served prior to November 14, 2005. The waiver was evident on the face of the record. As such, the Third District properly affirmed the denial of Petitioner's 3.800(a) motion.

ARGUMENT

THE DEFENDANT'S WAIVER OF CREDIT FOR TIME SERVED WAS KNOWING, INTENTIONAL AND VOLUNTARY.

The Third District Court of Appeal correctly found that the trial court properly denied the motion to correct sentence with respect to credit for time served. The written plea agreement, in conjunction with the transcript of the plea colloquy, makes it clear that the defendant was waiving any credit for time served for times prior to the most recent booking date on the probation violation proceedings. Not only did the written agreement which the defendant signed provide only for credit from that booking date, November 14, 2005, but, at the plea/sentencing hearing, there were several references to the credit as being only from date. Under those circumstances, any defendant would have been aware that he was entering into a plea agreement which was providing only credits from that date.

Defendant argues: "When a defendant is not aware of his entitlement to additional credit for time served, there cannot be a knowing, intentional and voluntary waiver of this additional credit for time served... Mr. Johnson's plea agreement was silent regarding his entitlement and/or waiver to additional credit for time served in Boot Camp... Mr. Johnson

should be granted credit for time served in Boot Camp as he did not knowingly, intentionally and voluntarily waive his statutory right to this credit for time served." (Initial brief, 14). Petitioner cites to several cases from District Courts of Appeal, other than the Third District, for the proposition that there can be no implied waiver of credit for time served. In the instant case, however, there was not an implied waiver, but rather Petitioner expressly waived credit for time served prior to November 14, 2005.

A defendant is generally entitled to credit for all time served in county jail before the sentence. § 921.161, *Fla. Stat*. 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 defendant can waive credit for time served as part of a plea agreement. *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995).

Waiver is "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So.2d 707, 711 (Fla. 2005).

Breaking down waiver into elements, 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).

In the instant case, Petitioner waived any additional credit for time served by signing the agreement on credit for time served and agreeing to credit from November 14, 2005 at the probation violation hearing. First, there existed additional credit which Petitioner might have been entitled to – i.e., the period of time spent in boot camp. Second, Petitioner was actually and constructively aware of his entitlement to this credit. There is no doubt that Petitioner had knowledge of the time he spent in boot camp. In addition, the agreement on credit for time served read as follows:

> I understand and agree that, as part of my plea bargain I will be receiving the following credit for time served (check one and fill in as appropriate):
>
> [ ] from ____, 200 to ____, 200
> [ ] ____ days credit for time served
> [X] all credit for time served from 11/14/05
> [ ] no credit for time served

(S.R. 33). This format set forth Petitioner's options and he knew that by agreeing to time served "from 11/14/05", as opposed to "all credit for time served" or a certain number of days, that he was waiving any other credit for time served. Petitioner clearly intended to relinquish his right to additional credit for time served by entering into the agreement with the State. In the instant case, Petitioner signed an agreement awarding him jail credit from a date certain. In signing this agreement Petitioner was put on notice that he was not being awarded **all** credit for time served. His waiver was knowing and voluntary. Therefore, he is not entitled to additional credit for time served.

Assuming that this Court finds that there was not an express waiver as evidenced by the agreement on credit for time served and as outlined above, then this Court should find that there was an implied waiver. "As a general principle of law, the doctrine of waiver encompasses not only the intentional or

voluntary relinquishment of a known right, but also conduct that warrants an inference of the relinquishment of a known right." *Singer v. Singer,* 442 So.2d 1020, 1022 (Fla. 3d DCA 1983). *See also*, *Russ v. Silbiger*, 988 So.2d 80 (Fla. 4th DCA 2008). When a waiver is implied, the acts, conduct or circumstances relied upon to show waiver must make out a clear case. *Woodlands Civic Ass'n., Inc. v. David W. Darrow, D.C., P.A.,* 765 So.2d 874, 877 (Fla. 5th DCA 2000).

In the instant case, there is a clear case of implied waiver. The form indicates four options for the Defendant.

> [ ] from _____, 200 to _____, 200
> [ ] _____ days credit for time served
> [X] all credit for time served from 11/14/05
> [ ] no credit for time served

(S.R. 33). The "from 11/14/05" was handwritten in on the form. Clearly based on the preprinted form, Defendant was aware of the possibility that he would receive "all credit for time served" as the base option on the form for an unqualified "all credit for time served" was conspicuously and intentionally not used and was modified to provide only for the credit from November 14, 2005. Rather than demand such credit, Defendant agreed to credit only from November 14, 2005. Defendant further agreed, twice, during the plea colloquy that he would only receive such credit. (S.R. 50, 54). By agreeing to this term of the plea

agreement, Defendant effectively waived any claim to additional credit time served. Such a waiver was recognized by the Third District in the opinion below and should be recognized by this Court as well.

Contrary to Petitioner's assertion that the Third District Court of Appeal stands alone, at least one other District Court has held the same as the Third District. 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 singed 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*. The instant case is clearly an even stronger credit than in

Hagan due to the use of the waiver form. As noted in the dissenting opinion in *Hagan*, both the instant case and *Joyner v. State*, 988 So.2d 670 (Fla. 3d DCA 2008) *rev. granted* 17 So.3d 705 (Fla. 2009), included written agreements on credit for time served which distinguish them from other cases involving waivers of credit for time served. *Hagan*, 35 Fla. L. Weekly D83, FN2.

The cases upon which the Petitioner relies are all distinctive from the instant case, insofar as they do not have a written plea agreement which specifies the time from which the credit runs while including other options regarding the credits, which options are not being checked off.

Petitioner further argues: "When a defendant is not aware of his entitlement to additional credit for time served, there cannot be a knowing, intentional and voluntary waiver of this additional credit for time served." (Initial brief, 14). This argument was not properly preserved for appellate review inasmuch as it was not argued to the trial court or the Third District. To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. *See*, *Archer v. State*, 613 So.2d 446, 448 (Fla. 1993); *Steinhorst v. State,* 412 So.2d 332, 338 (Fla. 1982). Petitioner's 3.800(a) motion does not claim that he was not

aware of his entitlement to additional credit for time served; it simply alleges that he was entitled to the additional credit. Petitioner's argument transforms a claim of entitlement to additional credit into an inquiry into the Petitioner's awareness and state of mind. This claim is also different from a claim that the trial court did not obtain an adequate waiver on the record.

Even if this claim is preserved, the claim regarding an alleged lack of awareness is not in the nature of a 3.800(a) claim. A claim brought pursuant to *Fla. R. Crim. Pro.* 3.800(a) asserts either the sentence was illegal, which means a sentence which cannot be imposed under any circumstances, *Carter v. State,* 786 So.2d 1173, 1181 (Fla. 2001); or that the defendant was not given the proper credit for time served. *State v. Mancino,* 714 So.2d 429, 433 (Fla. 1998). Claims in 3.800(a) proceedings must be ascertainable from the face of the record. *Id*. A claim that the Petitioner was unaware, however, goes to a defendant's state of mind and implicates non-record matters which would necessitate an evidentiary hearing, which is beyond the scope of a 3.800(a) proceeding. *See, Renaud v. State*, 926 So.2d 1241 (Fla. 2006).

A plea agreement is a contract and the rules of contract law are applicable to plea agreements. *State v. Frazier,* 697 So.2d 944 (Fla. 3d DCA 1997). 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). A defendant will not be relieved of an obligation that was included as a specific component of a plea agreement that was bargained for and voluntarily entered into by the defendant. *Allen v. State,* 642 So.2d 815 (Fla. 1st DCA 1994).

In the instant case, as part of the contract between the State and the Petitioner, the Petitioner agreed to credit time served from a date certain. This was the agreement between the parties that was entered into freely and voluntarily. A specific document, the agreement on credit for time served, was prepared to make concrete the specific credit that the Petitioner was to receive. Petitioner should not be entitled to additional credit for time served which was not bargained for between the parties. To do so, under these circumstances, would render plea agreements meaningless.

CONCLUSION

WHEREFORE, 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 AND FONT COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was furnished by U.S. Mail to SHANNON PATRICIA McKENNA, Asst. Public Defender, Counsel for Petitioner, 1320 NW 14th Street, Miami, FL 33125, on this 1st day of February, 2010, 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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