SUPREME COURT OF FLORIDA
CASE NO. SC12-226

KEVIN BRANTLEY,
Petitioner,

v.

L.T. Tribunal No(s).: 3D11-2746,
01-3018,
05-23151

STATE OF FLORIDA,
Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

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STATEMENT OF CASE AND FACTS

Petitioner, Kevin Brantley ("the Defendant"), appeals the Third District Court of Appeal's affirmance of the summary denial of his 3.800(a) motion which claimed that his sentence was illegal because it included illegal probation conditions. The Third District decision quoted *Garcia v. State*, 722 So. 2d 905 (Fla. 3d DCA 1998) for the proposition that "[t]he voluntary waiver of a right does not constitute an illegal sentence." *Brantley v. State*, 76 So. 3d 345 (Fla. 3d DCA 2011); (R. 90). The decision expressly and directly conflicts with decisions of this Court and the First and Fourth Districts which have held that a defendant cannot by means of a plea agreement confer on the court the authority to impose an illegal sentence. *See Bates v. State*, 750 So. 2d 6, 11 (Fla. 1999); *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991); *Williams v. State*, 500 So. 2d 501, 503 (Fla.1986) (receded from on other grounds in *Quarterman v. State*, 527 So. 2d 1380, 1382 (Fla. 1988)); *Beals v. State*, 14 So. 3d 286, 287 (Fla. 4th DCA 2009); *Ackermann v. State,* 962 So. 2d 407 (Fla. 1st DCA 2007).

On May 5, 2006, the Defendant pled guilty to a reduced charge of manslaughter in case number F05-23151 and reduced charges of sexual battery and strong-arm robbery in case number F01-3018. (R. 37-40.) More than five years later, he filed a "Motion to Correct Illegal Sentence" pursuant to Florida Rule of Criminal Procedure 3.800(a) which raised two grounds, one of which is relevant to

this appeal. (R. 3-12.) He asserted that the conditions of his probation were illegal and could not be imposed as a matter of law. (R. 6-10.)

The Plea Agreement

The Defendant challenged, among other things, the conditions of his plea agreement that: related to mandatory participation in a sex offender treatment program, prohibited him from employment which could put him in contact with minor children, and restricted where he could live:

> [**Condition 3:**] The Defendant shall participate in a Mentally Disordered Sexual Offender [MDSO] Treatment Program under the terms and conditions of the Program including, but not limited to, compliance with the rules, regulations and directives of the Program, regular reporting in person to the Program Representative or clinician, participation in counseling, and any other such requirements the staff shall impose, delete, or modify from time to time and hereby waives any claim of confidentiality regarding reports from the Program staff to participating community agencies or parties to this matter. . . .
>
> [**Condition 19:**] The Defendant is prohibited from teaching in public and private schools. The Defendant is prohibited from entering into any profession, taking any job or becoming involved in any activity or hobby which involves the teaching of, supervision of, baby-sitting of, care of custody of, control over, contact with, or tends to place him in contact with minor children. . . .
>
> [**Condition 22:**] The Defendant is prohibited from living within twenty-five hundred (2500) feet of a school, daycare center, park playground or other place where children regularly congregate.

(R. 37, 39.) Though condition 3 is relevant, this appeal challenges only conditions 19 and 22.

The Plea Colloquy

Only condition 3 relating to the MDSO treatment program was orally pronounced. During the plea colloquy, the Defendant confirmed that he understood he was "going to take a plea to ten years in the state prison as a habitual offender, followed by four years of reporting probation with the special condition that [he] successfully complete the MDSO treatment program . . . ." (R. 20.) After confirming that this was his plea agreement, the sentencing judge asked, "Are there any other special conditions other than the MDSO?" (R. 20.) To which the prosecutor responded, "[a]ll of the conditions . . . are contained in the written plea agreement. There are no additional special conditions aside from the conditions that are always imposed pursuant to a probation order." (R. 21.)

The 3.800(a) Motion

The Defendant's 3.800(a) motion made several factual allegations on its face. First, it alleged that the crimes to which he pled guilty did not fall within the chapters enumerated in section 948.03(5)(a), Florida Statutes (2000). (R. 6.) Second, it alleged that the statute did not apply to crimes committed before October 1, 1995. (R. 6.) Third, it asserted that the victim of the sexual battery to which he pled guilty was twenty-one years of age, so probation conditions related to minors did not apply to him. (R. 6, 8, 9.) Fourth, the motion alleged that

conditions 3, 19, and 22 were not reasonably related to the offenses to which he pled guilty. (R. 6, 8, 9.)

Within the motion, the Defendant identified the portions of the record which would demonstrate his entitlement to relief: the plea colloquy transcript, the judgment and sentence, the plea agreement, and the police report in case number F01-3018. (R. 10.)

The Order Denying the 3.800(a) Motion

The court adopted the reasoning offered by the State's response when denying the second ground of Defendant's motion in its "Order Denying Defendant's Motion to Correct Illegal Sentence." (R. 41-42.) The order attached the plea colloquy and the plea agreement. (R. 43-68.) The postconviction court explained the denial by agreeing that the sex offender probation conditions could not be imposed under statutory authority, but there was nothing illegal about making those conditions a part of a plea agreement:

> While the defendant may be correct that Florida Statute 948.30 . . . does not impose mandatory conditions of probation upon sex offenders whose crimes were committed prior to the date that statute took effect, there is nothing illegal about the State seeking to make these conditions a part of the plea agreement.

(R. 41.) The court went on to state the Florida Rule of Criminal Procedure 3.171 provides that the State and defense are encouraged to agree on pleas and that in *Garcia v. State*, 722 So. 2d 905 (Fla. 3d DCA 1998), the Third District noted, "a

party may waive any right to which he is legally entitled under the Constitution, a statute, or contract." (R. 41-42.)

The Third District's Opinion

The Third District affirmed, citing *Garcia* and quoting it for the proposition that "[t]he voluntary waiver of a right does not constitute an illegal sentence." *Brantley v. State*, 76 So. 3d 345 (Fla. 3d DCA 2011); (R. 90.)

SUMMARY OF ARGUMENT

The Third District's Opinion implicitly held that because the Defendant entered into a plea agreement, he could not challenge his illegal sentence even though it was not imposed pursuant to statutory authority or specifically agreed to as a special condition. In doing so, the Third District contravened well-established precedent from this Court and the First and Fourth Districts that a defendant may not by agreement confer on a judge authority to exceed the penalties established by law.

The record attachments to the postconviction court's order do not refute the Defendant's allegation that conditions 19 and 22 of his plea agreement impose sex offender probation terms which could only be applied legally to individuals who committed a specified sex crime against a minor. There is no evidence in the record that the Defendant specifically agreed to the probation conditions which could not have been imposed on him under the governing statute. In the same way

that a defendant may not agree to term of imprisonment which exceeds the maximum provided by statute, a defendant may not unknowingly acquiesce to an illegal condition of probation in a plea agreement. There is no evidence that the Defendant voluntarily waived his right to challenge the probation terms in his plea agreement as illegal. The Third District's Opinion should be quashed.

ARGUMENT

Issue: The Third District's Opinion expressly and directly conflicts with opinions from this Court and the First and Fourth Districts by holding that a defendant voluntarily waives the right to challenge an illegal sentence by entering into a plea agreement.

Standard of Review

The legality of a sentence is a question of law and subject to de novo review. *Flowers v. State*, 899 So. 2d 1257 (Fla. 4th DCA 2005).

Merits

A. The sentencing court did not have statutory authority to impose conditions 19 and 22 on the Defendant.

Florida Rule of Criminal Procedure 3.800(a) provides that a court may at any time correct an illegal sentence imposed by it when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief. The record attachments to the order denying the 3.800(a) motion do not refute the Defendant's allegation that certain conditions of his plea agreement could not be imposed under the statute authorizing sex offender probation conditions, and were

therefore illegal. Before arguing that the Third District's decision expressly and directly conflicts with the decisions of this Court and the First and Fourth Districts, we must establish preliminarily the premise that the courts must accept Defendant's allegation that his sentence was illegal.

General conditions of probation are mandated or authorized by statute. *Maddox v. State*, 760 So. 2d 89, 105 (Fla. 2000) (*citing State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996)). General conditions of probation do not have to be orally pronounced at the sentencing hearing and due process is satisfied as long as the conditions are included in the written sentencing order. *Id.* However, special conditions of probation, which are not authorized or mandated by statute, or found among the general conditions of probation listed in the rules of criminal procedure, must be orally pronounced at sentencing. *Id.* If the defendant is not given notice of the imposition of these sanctions during the oral pronouncement at sentence, the special condition must be struck and cannot be reimposed on remand. *Id.* The primary concern is that due process is satisfied by giving the defendant an opportunity to object following the imposition of a special condition of probation. *Id.* The requirement that special conditions of probation be pronounced in open court at the time of sentencing arises in part from Florida Rule of Criminal Procedure 3.700(b), which mandates that the sentence or other final disposition "shall be pronounced in open court."

The requirement that special conditions of probation must be orally pronounced applies to plea agreements where Florida courts have consistently held that a defendant will not be relieved of an obligation that was included as a specific component of a plea agreement which was bargained for and voluntarily entered into by defendant. *Allen v. State,* 642 So. 2d 815 (Fla. 1st DCA 1994) (holding that because an agreement to reimburse the county's medical expenses was a part of appellant's plea bargain, he could not challenge the legality of his obligation to pay those expenses); *see also Metellus v. State,* 817 So. 2d 1009, 1014 n. 6 (Fla. 5th DCA 2002) (holding that a defendant will not be relieved of obligation that was included as specific component of plea agreement that was bargained for and voluntarily entered into by defendant); *Ackermann v. State,* 962 So. 2d 407, 408 (Fla. 1st DCA 2007) (stating that a defendant cannot be sentenced to drug offender probation *unless he agrees to such as part of his plea bargain*); *Pollock v. Bryson,* 450 So. 2d 1183, 1186 (Fla. 2d DCA 1984) (while, ordinarily, a trial court may not require as a condition of probation that a defendant pay restitution in excess of the amount of damage his criminal conduct caused the victim, a defendant is estopped to raise such a complaint when he has expressly agreed to such a provision as a part of his plea bargain).

The postconviction court in this case was right for the wrong reason in concluding that the probation conditions the Defendant challenged could not be

imposed under the statute authorizing sex offender probation, section 948.03(5), Florida Statutes (2000).[1] Chapter 948, Florida Statutes (2000), offers a detailed statutory approach to "Probation and Community Control." Within this chapter, the Legislature created a specific scheme to address defendants who are sex offenders, by authorizing trial courts to impose certain conditions of probation without oral pronouncement for violation of certain chapters, such as chapter 794, which makes sexual battery illegal. § 948.03(5)(a), Fla. Stat. (2000).

Under section 948.03(5), Florida Statutes (2000), certain sex offender probation conditions could only be imposed without oral pronouncement if the

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[1] The offense date is not provided in the record attachments which were included with the postconviction court's order, but the Department of Corrections website indicates that the sexual battery took place on October 5, 2000. *Department of Corrections: Inmate Release Information Detail*, http://www.dc.state.fl.us/InmateReleases/detail.asp?Bookmark=1&From=list&Ses sion ID=914829675. Therefore, the Defendant was correct in asserting that section 948.03(5), Florida Statutes (2000) would apply in determining whether or not his sentence is legal. *See, e.g.*, *Rozinski v. State*, 298 So. 2d 546 (Fla. 2d DCA 1974) (holding a sentence must be imposed under the law in effect at the time the crime was committed and defendant cannot be punished under provisions of a statute enacted or amended subsequent to the commission of the offense); Art. X, §9, Fla. Const.

The order states that the Defendant mistakenly cited section 948.03, Florida Statutes, rather than section 948.30, Florida Statutes. (R. 41-42.) However, it is entirely possible the Defendant applied the correct statute if the crimes were committed before section 948.30 was enacted on June 24, 2004, which is likely the case. Ch. 04-373, § 18, at 10-12, Laws of Fla. Section 948.30, Florida Statutes (2005), which would have been in force at the moment of the Defendant's sentencing contains the exact same language as section 948.03, Florida Statutes (2000) regarding the probation conditions relating to restricting employment and where a sex offender could live if the victim was a minor.

victim of the crime was a minor. §§ 948.03(5)(a)2., 6. (Fla. Stat. 2000). Condition 19, which restricts where the Defendant may be employed, his activities, and his hobbies, was governed by section 948.03(5)(a)6., Florida Statutes (2000). The statute provided that if the victim of a sexual battery was a minor, the defendant could be prohibited from working or volunteering in a job which would put him in contact with children as a condition of probation without oral pronouncement:

> If the victim was under age 18, a prohibition on working for pay or as a volunteer at any place where children regularly congregate, including, but not limited to, schools, day care centers, parks, playgrounds, pet stores, libraries, zoos, theme parks, and malls.

§ 948.03(5)(a)6., Fla. Stat. (2000).

Condition 22, which restricts where the Defendant can live, was governed by section 948.03(5)(a)2., Florida Statutes (2000). This statute provided that if the victim of a sexual battery was a minor, the defendant could be prohibited from living within a certain number of feet from a school, day care center, park or other place where children congregate as a condition of probation which could be imposed without oral pronouncement:

> If the victim was under the age of 18, a prohibition on living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate, as prescribed by the court.

§ 948.03(5)(a)2., Fla. Stat. (2000).

The postconviction court did not attach any documents from the record which showed that the victim was a minor. The court could have attached the information, the police report, or the judgment and sentence in order to refute the Defendant's allegation that the victim of the sexual battery was twenty-one years of age. Therefore, conditions 19 and 22 of the Defendant's plea agreement were not authorized under the statute governing sex offender probation conditions and could not be imposed as special conditions without oral pronouncement.

The record attachments also do not refute the Defendant's allegation that conditions 19 and 22 were not imposed as special conditions by oral pronouncement at sentencing. Where the conditions of probation are not imposed pursuant to the statute, but instead by virtue of a plea agreement, the defendant must specifically agree to those special conditions. *See Beals v. State*, 14 So. 3d 286, 287 (Fla. 4th DCA 2009) (reversing imposing of drug offender probation, but remanding with leave for the trial court to substitute, for drug offender probation, a term of probation with or without special conditions related to substance abuse); *Andrew v. State*, 988 So. 2d 158 (Fla. 4th DCA 2008) (same).

Therefore, because the probation terms contained in conditions 19 and 22 of the Defendant's plea agreement could not be imposed as general conditions under section 948.03(5), Florida Statutes (2000), and they were not imposed as special conditions, they constituted an illegal sentence.

B. The Third District's opinion expressly and directly conflicts with this Court's opinions and opinions from the First and Fourth Districts by holding an illegal sentence may be imposed pursuant to a plea agreement.

1. A defendant cannot agree to an illegal sentence in a plea agreement.

This Court has stated that while a defendant may waive some purely personal constitutional rights as a part of a voluntary plea agreement, "[a] defendant cannot confer on others a right to do something that the law does not permit." *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991). In *Larson*, the opinion went on to state, "[f]or example, a defendant cannot by agreement confer on a judge authority to exceed the penalties established by law. Such an illegal sentence must fail." *Id.* (internal citation omitted); *see also Bates v. State*, 750 So. 2d 6, 11 (Fla. 1999) (holding in part that a defendant could not waive the possibility of parole by agreement when the Legislature had not provided for life without the possibility of parole as punishment for his crime); *Williams v. State*, 500 So. 2d 501, 503 (Fla.1986) (stating the general proposition that a trial court cannot impose an illegal sentence pursuant to a plea bargain) (receded from on other grounds in *Quarterman v. State*, 527 So. 2d 1380, 1382 (Fla.1988)).

All of the district courts of appeal have followed suit by holding that a plea bargain cannot justify the imposition of an illegal sentence. *See generally Darling v. State,* 886 So. 2d 417, 418 (Fla. 1st DCA 2004) (holding that a defendant cannot

plead to an illegal sentence where sentence exceeded thirty year maximum for attempted first degree murder); *Bruno v. State,* 837 So. 2d 521, 523 (Fla. 1st DCA 2003) (holding the illegal sentence of surgical castration could not be imposed even though the defendant agreed to it in a negotiated plea); *Hollybrook v. State,* 795 So. 2d 1012, 1013 (Fla. 2d DCA 2001) (holding that a defendant may not plead to an illegal sentence in excess of the statutory maximum); *Ramos v. State*, 931 So. 2d 1023, 1024 (Fla. 3d DCA 2006) (holding in part that a defendant may not plead to an illegal sentence in excess of the statutory maximum for a life felony); *Gifford v. State,* 744 So. 2d 1046, 1048 (Fla. 4th DCA 1999) (holding that postconviction relief was not precluded where an illegal sentence exceeded the statutory maximum even though the defendant entered into a negotiated plea); *Walters v. State,* 812 So. 2d 457, 458 (Fla. 5th DCA 2002) (holding that a defendant may not plead to an illegal sentence in excess of the statutory maximum).

2. An illegal probation condition is an illegal sentence unless the defendant agrees to it as a special condition.

"An illegal sentence has generally been defined as 'one that that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances.'" *State v. McMahon*, 37 Fla. L. Weekly S259 (Fla. April 5, 2012) (quoting *State v. Akins*, 69 So. 3d 261, 268–69 (Fla. 2011) (quoting *Williams v. State,* 957 So. 2d 600, 602

(Fla. 2007))); *see also Jackson v. State*, 983 So. 2d 562, 574 (Fla. 2008) (same). This Court has characterized probation as one of "five basic sentencing alternatives in Florida." *Larson*, 572 So. 2d at 1370 (quoting *Poore v. State*, 531 So. 2d 161, 164 (Fla. 1988)).

Decisions from the First and Fourth Districts directly and expressly conflict with the Third District's opinion by holding that a defendant may challenge an illegal probation condition even when it is imposed pursuant to a plea agreement. *Beals v. State*, 14 So. 3d 286, 287 (Fla. 4th DCA 2009) (reversing summary denial of motion for postconviction relief where the sentence the defendant pled to included the illegal imposition of drug offender probation which was not authorized under section 948.20, Florida Statutes); *Ackermann v. State,* 962 So. 2d 407 (Fla. 1st DCA 2007) (reversing summary denial of rule 3.800(a) motion; defendant may not be sentenced to drug offender probation unless he pleas to an enumerated chapter 893 offense or has specifically agreed to such probation in plea agreement). *Beals* and *Ackermann* both addressed drug offender probation, which is very similar to sex offender probation in that it can only be imposed for certain crimes pursuant to section 948.20, Florida Statutes, but it can be imposed as a special condition if the defendant agrees to it. This Court's precedent has made it clear that an illegal sentence cannot be imposed by virtue of a plea agreement. *Larson*, 572 So. 2d at 1371.

3. In this case the Defendant did not specifically agree to probation conditions 19 and 22 and thus did not voluntarily waive his right to challenge those conditions as illegal.

The record attachments do not indicate that the Defendant specifically agreed to conditions 19 and 22 as a part of his plea bargain, as those conditions were not orally pronounced during the colloquy.

The Third District erred in relying on *Garcia v. State*, 722 So. 2d 905 (Fla. 3d DCA 1998), for the blanket statement that the "voluntary waiver of a right does not constitute an illegal sentence." The entry of a plea agreement does waive some of a defendant's constitutional rights; however, it does not waive a defendant's right to challenge an illegal sentence. *Larson*, 572 So. 2d at 1371; *Amendments to Florida Rules of Appellate Procedure*, 685 So. 2d 773 (Fla. 1996) (holding that one of the issues that may be raised on appeal after a defendant pleads guilty or no contest is the illegality of a sentence).

Therefore, because the record attachments to the postconviction court's order did not refute the motion's allegation that conditions 19 and 22 of the Defendant's probation could not be imposed under section 948.03, Florida Statutes (2000), and he did not specifically agree to them, the Third District erred by affirming where this Court and others have clearly held "[a] defendant cannot confer on others a right to do something that the law does not permit." *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991).

CONCLUSION

For all the forgoing reasons, Petitioner respectfully requests that the Court quash the Opinion of the Third District, which conflicts with the decisions of this Court and the First and Fourth Districts. The Third District should reverse the postconviction court's order and remand for resentencing or for the attachment of portions of the record conclusively refuting the Defendant's allegations that the probation conditions were illegal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Keri T. Joseph**, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 650, Miami, Florida, 33131on this 7th day of August, 2012 by U.S. Mail.

CREED & GOWDY, P.A.

/s/ Jennifer Shoaf Richardson
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

CREED & GOWDY, P.A.

/s/ Jennifer Shoaf Richardson
Attorney