

PROVIDED TO TOMOKA C.I. SUPREME COURT OF FLORIDA
2-8-12 FOR MAILING K.B.

FILED
THOMAS G. FLINN
2012 FEB 20 PM 2:04
BY _____

KEVIN BRANTLEY,)
PETITIONER,)
v.)
STATE OF FLORIDA,)
RESPONDENT.)

9512-226
CASE NO: (TO BE ASSIGNED)
L.T. NOS.: 3D11-2746
FOI-3018
FOS-23151

PETITIONER'S JURISDICTIONAL BRIEF

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

KEVIN BRANTLEY
DCH# 412858
TOMOKA C.I.
3950 TIGER BAY ROAD
DAYTONA BEACH, FL. 32124

PETITIONER, PRO'SE

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS	iii
STATEMENT OF CASE AND FACTS	1.
SUMMARY OF THE ARGUMENT	4.
JURISDICTIONAL STATEMENT	4.
ARGUMENT:	
THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINT OF LAW.	5.
CONCLUSION	9.
CERTIFICATE OF SERVICE	10.

TABLE OF CITATIONS

PAGE

CASES:

<u>CALDWELL v. STATE</u> , 914 So2d 1069 (FLA. 2d DCA 2005);	7, 8.
<u>CASSETTA v. STATE</u> , 57 So3d 265 (FLA. 5 th DCA. 2011);	6.
<u>DEROO v. UNITED STATES</u> , 223 F.3d 919 (8 th CIR. 2000);	6.
<u>FERGUSON v. STATE</u> , 804 So2d 411, 412 (FLA. 4 th DCA 2001);	6.
<u>GARCIA v. STATE</u> , 722 So2d 905, 907 (FLA. 3d DCA 1998);	3., 5.
<u>IN RE AMEND. TO FLA. R. APP.P.</u> , 685 So2d 773 (FLA. 1996);	6.
<u>LARSON v. STATE</u> , 572 So2d 1368, 1371 (FLA. 1991);	5., 8.
<u>LEMASTER, v. USAA LIFE INS. CO.</u> , 922 F. SUPP. 581 (M.D. FLA. 1996);	5.
<u>Mc DUFFIE v. STATE</u> , 946 So2d 99, 100 (FLA. 2d DCA. 2006);	6.
<u>RICHEVDOLLAR v. STATE</u> , 46 So3d 100 (FLA. 1 st DCA 2010);	7.
<u>TAYLOR v. STATE</u> , 687 So2d 33 (FLA. 3d DCA. 1997);	7.

OTHER PROVISIONS:

ART. V § 3 (b)(3), FLA. CONST. (1980);	4.
§ 948.03, FLA. STAT. (2000);	2.
§ 948.03. (1) (c), FLA. STAT. (2000);	7.
§ 948.03 (5) (a) 2., FLA. STAT. (2000);	8.
§ 948.03 (6), FLA. STAT. (2000);	7.
FLA. R. CRIM. P. 3.800 (a);	2.
FLA. R. APP. P. 9.030 (a)(2)(A)(iv);	4.

STATEMENT OF THE CASE AND FACTS

THE PETITIONER, KEVIN BRANTLEY, WAS CHARGED IN THE ELEVENTH JUDICIAL CIRCUIT FOR MIAMI - DADE COUNTY WITH MULTIPLE OFFENSES IN SIX CASES UNDER CASE # FOI-3018, RESULTING FROM AN ARREST ON JANUARY 26, 2001.

WHILE IN CUSTODY FOR THE AFORE MENTIONED CASE #, THE PETITIONER WAS CHARGED ON JULY 21, 2005 UNDER CASE # FOS-23151 WITH FIRST DEGREE MURDER FOR AN ALLEGED OFFENSE THAT OCCURRED ON NOVEMBER 6, 1990.

ON MAY 5, 2006 THE PETITIONER, PURSUANT TO A PLEA AGREEMENT, ENTERED A PLEA OF GUILTY TO BOTH CASES AND WAS CONVICTED IN CASE # FOI-3018 TO THE REDUCED CHARGE OF SEXUAL BATTERY AND STRONG-ARM ROBBERY, AND IN CASE # FOS-23151 TO THE REDUCED CHARGE OF MANSLAUGHTER.

THEREUPON THE PETITIONER WAS SENTENCED IN BOTH CASES TO A SPLIT SENTENCE OF TEN (10) YEARS IN PRISON FOLLOWED BY FOUR (4) YEARS OF PROBATION AS A HABITUAL FELONY OFFENDER (HFO).

AS SPECIAL CONDITION OF PROBATION PETITIONER IS REQUIRED TO COMPLETE SUCCESSFULLY THE "MDSO" PROGRAM AND PETITIONER HAS TO COMPLY WITH THE TERMS AND CONDITIONS OF THE WRITTEN PLEA AGREEMENT.

ON OR ABOUT AUGUST 29, 2011 THE PETITIONER FILED A MOTION TO CORRECT AN ILLEGAL SENTENCE PURSUANT TO RULE 3.800(a), FLA. R. CRIM. P., WHERE PETITIONER ALLEGED UNDER OATH TWO CLAIMS FOR RELIEF:

I. THE DEFENDANT ASSERTS HIS HFO-SENTENCE IS ILLEGAL AS HE DID NOT HAVE THE REQUISITE PREDICATE CONVICTIONS TO BE SENTENCED AS A HFO, WHERE FOUR OF THE PREDICATE CONVICTIONS WERE COMMITTED AFTER THE OFFENSE FOR WHICH DEFENDANT WAS BEING HABITUALLIZED AND TWO OF THE PREDICATE CONVICTIONS WERE ENTERED ON THE SAME DAY WHICH HABITUALLIZATION WAS IMPOSED.

II. THE DEFENDANT ASSERTS HIS SENTENCE IS ILLEGAL THAT PROBATION CONDITIONS 3, 5, 18, 19 AND 22 OF THE PLEA AGREEMENT DOES NOT MEET THE REQUIREMENTS SET FORTH IN § 948.03, FLA. STAT. (2000).

ON SEPTEMBER 14, 2011, MIAMI-DADE CIRCUIT JUDGE JORGE CUEVO ENTERED AN ORDER STRIKING THE HFO-DESIGNATION AS TO CASE # FOS-23151, AND DENIED PETITIONER'S MOTION IN ALL OTHER RESPECTS.

PETITIONER APPEALED THE DENIAL OF THE OTHER CLAIMS TO THE THIRD DISTRICT COURT

OF APPEAL, WHERE PETITIONER ARGUED THAT THE TRIAL COURT ERRED WHEN IT DENIED HIS MOTION TO CORRECT ILLEGAL SENTENCE, BECAUSE HIS SENTENCE IS TRULY ILLEGAL DUE TO THE ORDER OF PROBATION CONTAINING ILLEGAL AND/OR INVALID CONDITIONS AS THE CONDITIONS IN QUESTION ARE NOT STATUTORILY AUTHORIZED, WERE NEVER ORALLY MADE PART OF THE SENTENCING RECORD, THUS WERE NEVER FORMALLY ACCEPTED BY THE TRIAL COURT, AND PETITIONER NEVER CONSENTED TO WAIVE THIS ISSUE.

ON NOVEMBER 23, 2011 THE THIRD DISTRICT COURT OF APPEAL ISSUED ITS OPINION IN WHICH THE DISTRICT COURT PER CURIAM AFFIRMED THE TRIAL COURT'S ORDER STATING THAT "THE VOLUNTARY WAIVER OF A RIGHT DOES NOT CONSTITUTE AN ILLEGAL SENTENCE", SEE GARCIA V. STATE, 722 So2d 905, 907 (FLA. 3d DCA. 1998) (SEE APPENDIX).

THE PETITIONER FILED A MOTION FOR RE-HEARING, WHICH THE THIRD DISTRICT COURT DENIED ON JANUARY 6, 2012.

THIS PROCEEDING FOLLOWS.

SUMMARY OF THE ARGUMENT

THE PETITIONER ARGUES THAT THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEALS, IN THAT EVEN A VOLUNTARY PLEA AGREEMENT BY A DEFENDANT CANNOT CONFER ON OTHERS A RIGHT TO DO SOMETHING THE LAW DOES NOT PERMIT, AND IF A CONDITION OF PROBATION IS ILLEGAL IT MUST BE MODIFIED.

IN FURTHERANCE A TRIAL COURT CANNOT IMPOSE AN ILLEGAL SENTENCE, OR ILLEGAL CONDITIONS OF PROBATION, EVEN PURSUANT TO A PLEA BARGAIN OR PLEA AGREEMENT.

THUS, THE VOLUNTARY WAIVER OF A RIGHT DOES NOT EXTEND TO SUCH AN ILLEGAL SENTENCE OR THE IMPOSITION OF ILLEGAL CONDITIONS OF PROBATION.

JURISDICTIONAL STATEMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF A DISTRICT COURT OF APPEAL THAT EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW. ART. V § 3 (b) (3), FLA. CONST. (1980); FLA. R. APP. P. 9.030 (a) (2) (A) (iv).

ARGUMENT

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEALS ON THE SAME POINT OF LAW

THE PETITIONER ASSERTS THAT THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL (SEE APPENDIX) WARRANTS REVIEW BY THIS COURT.

THE COURT BELOW HELD THAT "THE VOLUNTARY WAIVER OF A RIGHT DOES NOT CONSTITUTE AN ILLEGAL SENTENCE", RELYING ON GARCIA V. STATE, 722 So2d. 905, 907 (FLA. 3d DCA 1998).

APPARENTLY THE THIRD DISTRICT IMPLIES THAT EVEN THOUGH THE TRIAL COURT IN PETITIONER'S CASE IMPOSED ILLEGAL AND INVALID CONDITIONS ON PROBATION THE PETITIONER WAIVED ANY CHALLENGES TO THEM. THIS WOULD BE AN ERROR IN LEGAL THINKING.

"EVEN A VOLUNTARY PLEA AGREEMENT BY A DEFENDANT CANNOT CONFER ON TO OTHERS A RIGHT TO DO SOMETHING THE LAW DOES NOT PERMIT", LARSON V. STATE, 572 So2d 1368, 1371 (FLA. 1991).

"UNDER FLORIDA LAW, THERE CAN BE NO WAIVER WITHOUT EXPRESS OR IMPLIED KNOWLEDGE OF THAT WHICH IS TO BE WAIVED." LEMASTER V. USAA LIFE INS. CO., 922 F. SUPP. 581 (M.D. FLA. 1996).

FURTHERMORE, IT IS A LONG STANDING PRINCIPLE THAT "A TRIAL COURT CANNOT IMPOSE AN ILLEGAL SENTENCE EVEN PURSUANT TO A PLEA AGREEMENT", SEE MCDUFFIE v. STATE, 946 So 2d 99, 100 (FLA. 2d DCA. 2006); FERGUSON v. STATE, 804 So.2d. 411, 412 (FLA. 4TH DCA 2001); AND CASSIJA v. STATE, 57 So3d 265 (FLA. 5TH DCA. 2011).

"THE ENTRY OF A PLEA AGREEMENT DOES WAIVES SOME OF A DEFENDANT'S CONSTITUTIONAL RIGHTS; HOWEVER, IT DOES NOT WAIVE A DEFENDANT'S RIGHT TO CHALLENGE AN ILLEGAL SENTENCE". IN RE AMEND. TO FLA. R APP. P., 685 So2d 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).

A DEFENDANT MAY VALIDLY WAIVE RIGHT TO COLLATERALLY ATTACK CONVICTION OR SENTENCE PURSUANT TO A MOTION TO VACATE SENTENCE, AS PART OF PLEA AGREEMENT; HOWEVER, SUCH WAIVERS ARE NOT ABSOLUTE, AS DEFENDANTS CANNOT WAIVE RIGHT TO CHALLENGE AN ILLEGAL SENTENCE, OR A SENTENCE IN VIOLATION OF TERMS OF A PLEA AGREEMENT, AND DECISION TO BE BOUND BY PROVISIONS OF A PLEA AGREEMENT MUST BE KNOWING AND VOLUNTARY. SEE ALSO DEROO v. UNITED STATES, 223 F.3d 919 (8TH CIR. 2000).

HENCE, THE PETITIONER EXTENSIVELY DEMONSTRATED IN THE PROCEEDINGS BELOW THAT THE CONDITIONS IN QUESTION ARE ILLEGAL, AS THEY

ARE NOT STATUTORILY AUTHORIZED. IN SHORT SUMMARY, THE TRIAL COURT HERE IMPOSED PROBATION CONDITIONS WHICH EITHER ARE UNAUTHORIZED OR DO NOT APPLY TO PETITIONER:

[CONDITION 3] TO ACTIVELY PARTICIPATE IN A MDDO-TREATMENT PROGRAM, WHICH APPLIES ONLY IN CASES WHERE THE VICTIM WAS A CHILD; IN PETITIONER'S CASE THE VICTIM WAS AN ADULT.

[CONDITION 5] PROHIBITS EARLY TERMINATION OF THE PROBATION TERMS WITHOUT THE EXPRESS CONSENT OF THE STATE ATTORNEY, WHEN CONTRARY TO THAT § 948.03 (6) DOES NOT REQUIRE THE CONSENT OF THE STATE ATTORNEY.

[CONDITION 18] REQUIRES PETITIONER TO BE GAINFULLY EMPLOYED "FULL-TIME", WHICH IS BEYOND PETITIONER'S CONTROL ESPECIALLY IN THE PRESENT POOR ECONOMY. SEE TAYLOR v. STATE, 687 So2d 33 (FLA. 3d DCA. 1997), § 948.03 (1)(C), FLA. STAT. (2000).

[CONDITION 19] PROHIBITS PETITIONER FROM TEACHING ETC. IN SCHOOLS, OR ANY EMPLOYMENT IN CARE OR CUSTODY OF CHILDREN, OR HAVING CONTACT WITH ANYONE UNDER THE AGE 18. YET, SUCH CONDITION APPLIES ONLY TO OFFENDERS WHOSE VICTIM WAS UNDER THE AGE OF 18, WHEREAS IN PETITIONER'S CASE THE VICTIM WAS AN ADULT. SEE RICHEN DOLLAR v. STATE, 46 So3d 100 (FLA. 1ST DCA. 2010); AND CALDWELL v. STATE, 914 So2d 1069 (FLA. 2d DCA. 2005).

[CONDITION 22] PROHIBITS PETITIONER FROM LEVING WITHIN TWENTY-FIVE-HUNDRED (2500)

FEET OF A SCHOOL, DAY CARE CENTER, PARK, ETC., WHEN AGAIN SUCH CONDITION ONLY APPLIES TO OFFENDERS WHOSE VICTIM WAS UNDER THE AGE OF 18, AND THE STATUTE ONLY AUTHORIZES ONE-THOUSAND (1000) FEET. SEE CALDWELL v. STATE, 914 So2d 1069 (FLA. 2d DCA. 2005), AND ALSO § 948.03(5)(a) 2., FLA. STAT. (2000).

NEVERTHELESS, THE TRANSCRIPT AND RECORD IN PETITIONER'S CASE DOES NOT ESTABLISH A KNOWING AND VOLUNTARY WAIVER TO CHALLENGE THOSE "ILLEGAL" CONDITIONS, AND IN LIGHT OF RULINGS SUCH AS THE ONE OF THIS COURT IN EXAMPLE IN LARSON v. STATE, 572 So2d 1368, AT 1371 (FLA. 1991), "EVEN A VOLUNTARY PLEA AGREEMENT BY A DEFENDANT CANNOT CONFER ON OTHERS A RIGHT TO DO SOMETHING THE LAW DOES NOT PERMIT", MEANING IN PETITIONER'S CASE TO AGREE TO CONDITIONS WHICH ARE NOT AUTHORIZED BY LAW, AND AS ARE ILLEGAL OR INVALID.

THEREFORE, THE OPINION BELOW CREATES A CONFLICT IN LAW, AND AS SUCH THIS COURT SHOULD ACCEPT JURISDICTION.

CONCLUSION

BASED ON THE FOREGOING FACTS, ARGUMENT, AND CITED AUTHORITIES IT APPEARS THAT A CONFLICT EXISTS BETWEEN THE DECISION BELOW AND DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL, WHICH REQUIRES A REVIEW BY THIS COURT TO RESOLVE THE CONFLICT.

WHEREFORE, THE PETITIONER ASKS THIS HONORABLE COURT TO EXERCISE ITS JURISDICTION IN THIS CASE.

RESPECTFULLY SUBMITTED,



KEVIN BRANTLEY

DC # C412858

TOMOKA C.I.

3950 TIGER BAY ROAD

DAYTONA BEACH, FL. 32124

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THE FOREGOING JURISDICTIONAL BRIEF HAS BEEN FURNISHED TO:

THOMAS D. HALL, CLERK
SUPREME COURT OF FLORIDA
500 SOUTH DUVAL STREET
TALLAHASSEE, FL. 32399

OFFICE OF THE ATTORNEY
GENERAL, PAMELA Jo BONDI
THE CAPITOL, PL-01
TALLAHASSEE, FL. 32399

BY PLACING THE SAME IN HANDS OF PRISON OFFICIALS
FOR MAILING THIS 8th DAY OF February, 2012.



KEVIN BRANTLEY
PETITIONER, PRO'SE