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IN THE SUPREME COURT OF FLORIDA

DARRICK L. MCFADDEN, :

Petitioner, :

vs. : Case No. SC14-93

STATE OF FLORIDA, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In 2008, Darrick McFadden was convicted of two counts each of second degree murder and robbery with a firearm and was sentenced to 55 years in prison. McFadden was a principle to the offenses; he drove a vehicle from which two others with him perpetrated the robberies and shootings of the victims. (R7-10). After McFadden's trial, the State encountered problems in prosecuting the more culpable codefendant, Carlos McSwain, who actually robbed and shot the victims. (R8-9).

The prosecutor described the "very unusual and unique difficulties" encountered in prosecuting McSwain, as follows: (1) the confession of McSwain was suppressed, (2) the lone surviving eye witness was an illegal alien from Nicaragua who disappeared, (3) that witness had originally identified the wrong man (a Mr. Flores), and (4) Flores gave a false confession after five-and-a-half hours of police questioning. (R10-12). In addition, although codefendant Gibbs had testified in McFadden's case, he recanted his testimony and indicated that he would not cooperate with the prosecution of McSwain. (R13-14).

With the prosecution of McSwain at a dead end, the state attorney sought McFadden's cooperation in making the case against McSwain. The prosecutor advised McFadden that his cooperation would be rewarded pursuant to the new statute authorizing the State to move for a reduction of sentence of any person who provides substantial assistance, section 921.186,

Florida Statutes (2010). McFadden agreed to cooperate, and he did so by testifying truthfully against McSwain in a deposition. (R15). As a direct result of McFadden's deposition testimony, the State was able to prosecute McSwain, who entered pleas to two counts of manslaughter. (R15).

The state attorney then filed a motion in the trial court, pursuant to the new statute, asking the trial judge to reduce or suspend McFadden's sentence. (R1, "State's Motion to Reduce or Suspend the Defendant's Sentence for Providing Substantial Assistance Pursuant to Florida Statute 921.186"). The motion was filed by Assistant State Attorney Robert Lee in October 2011. Mr. Lee explains in the motion that McFadden agreed to provide assistance to the State, and as a result of the substantial assistance he provided the State was able to prosecute Carlos McSwain, who thereafter pled no contest to two counts of manslaughter and was sentenced to ten years in prison. In the motion, Lee writes: "But for the Cooperation and Substantial Assistance of the Defendant Darrick McFadden, the State of Florida would not have been able to obtain the plea of Carlos McSwain and would have had no alternative but to Nol Pros [its] case." (R1).

The motion was heard before Associate Senior Judge Jack Schoonover.[1] (R3). Assistant State Attorney Lee explained his position at the hearing:

> I clearly am telling the Court but for [McFadden's] assistance in first agreeing to cooperate and then providing his deposition and then being here ready to testify, the

[1] The judge is now deceased. See The Florida Bar website, Member Profile for Jack R. Schoonover.

> State would not have been able to proceed against Mr. McSwain. We really would have had no alternative but to nolle pros because we couldn't even have gotten to the fingerprint so to speak.

(R16).

Judge Schoonover was unfamiliar with the new substantial assistance statute and indicated through his questions and comments his disagreement with the policy behind the statute and with the State's use of the statute to seek the reduction of McFadden's sentence.

> THE COURT: What are the ramifications of approving things like this?
>
> MR. LEE: Because this is a new statute . . . . that just came into play last year, I don't know we have a firm answer. But the statute itself, and the language used seems to trump all other statutes. There is no mandatory minimums involved, and no habitual offender which also assist us. Even though –
>
> THE COURT: Has anyone attacked that statute yet?
>
> MR. LEE: Not to my knowledge. And –
>
> THE COURT: Shouldn't it be attacked?

(R17, emphasis added). The prosecutor explained that the statute was unlikely to be "attacked" by the State because the statute was useful tool for the prosecution:

> MR. LEE: I think it's unlikely [to be attacked] as we're here today. We're in a peculiar situation where the State is, although not representing Mr. McFadden, we're certainly not complaining to whatever the Court does. We will keep our word, and there are policy reasons in the future that I will hold to this because I have another co-defendant in a different murder case that has been convicted at trial who has got life in prison who is now cooperating in a case where I had a confession suppressed.

(R17).

In response to the judge's queries, Lee explained that the statute was designed to put state prosecutors in parity with federal prosecutors and give them the ability to use the substantial assistance of an inmate to help make new cases. (R18). Neither party would be in a position to complain about the use of the statute. (R18).

The judge expressed concern that use of the statute would lead to other prisoners trying to get a substantial assistance deal:

> THE COURT: It just seems that I see everyone up in prison serving a life sentence or 10 years or more saying God what can I come up with.

(R19).

The judge expressed skepticism over whether the State needed McFadden's cooperation to move forward with McSwain's prosecution, and he expressed his opinion that the State should have tried to prosecute McSwain without promising McFadden anything. First, the judge asked if McFadden's testimony at his own trial was consistent with his deposition testimony. When the prosecutor answered that it was, the judge said: "So what substantial assistance did he give you? You already had it." (R20). The prosecutor explained that McFadden's trial testimony was not admissible in a trial against McSwain. (R20).

The judge pressed the prosecutor on his reason for reaching out to McFadden. "THE COURT: And you couldn't have just called and said McSwain's trial is here, are you willing to

testify; you couldn't have done that first?" (R21). When the prosecutor responded that he would not proceed that way, the judge stated: "I'm just trying to avoid a tit for tat so to speak, a deal either threatening or promising anything." (R22).

The prosecutor was forced to defend the exercise of his statutory authority, explaining that the State has the discretion to move for the reduction in sentence and that offers made by inmates to give substantial assistance are not controlling. (R22). The judge indicated disagreement with the concept of rewarding an inmate for providing substantial assistance and indicated that he found it hard to believe that the Legislature knew what it was doing when it passed the statute.

> THE COURT: We're going to get more [inmate offers] now after this one.
>
> MR. LEE: That very well may be, and the interesting thing about the statute – and I have to believe that the legislature knew what they were doing ---
>
> THE COURT: It's hard –

(R22).

The judge indicated concern over whether a limitations period existed for the substantial assistance statute. He pointed out that rule 3.850 has a two-year time limit. (R45). The prosecutor stated that there was no time limitation for substantial assistance in the new statute. (R46).

The judge also indicated that McFadden should have offered to cooperate with the State before his trial. When it was pointed out that he had, in fact, offered cooperation before

trial, the judge continued to express skepticism.

> THE DEFENDANT: . . . I fully take responsibility for getting in that van with them two dudes, and that's the reason why I provided substantial assistance even though it may be –
>
> THE COURT: But not until after you were sentenced, right?

(R48).

And the judge expressed his belief that the substantial assistance provided by McFadden could be without value if, in the future, McSwain were able to withdraw his plea.

> THE COURT: What happens if more facts come to light? Say this motion is denied and more facts come to light such as McSwain withdraws his plea, that means that substantial assistance had no value, right?

(R50). The prosecutor responded that the court should not engage in speculation. (R50).

The judge then denied the motion to reduce sentence with the following remarks:

> THE COURT: After reviewing the testimony, the statute itself, the Court finds it has no alternative than to deny the motion. The philosophy is good, sir and everything else if I could substantiate -- I did take some of that into consideration at the time that I sentenced you.
>
> That will be it.

(R51, emphasis added).

McFadden appealed to the Second District Court of Appeal, arguing that the trial judge failed to properly adjudicate the State's motion. He asserted that the judge's comments indicated that he denied the motion for improper reasons, such as

(1) philosophical disagreement with the legislature's wisdom in enacting the substantial assistance statute; (2) disapproval of the prosecutor's decision to utilize the statute; and (3) the judge's opinion that McFadden's substantial assistance could not be rewarded pursuant to the statute because he should have volunteered to cooperate with the State before his own trial or because to reward McFadden would constitute a "tit for tat." McFadden argued, inter alia, that the trial judge's ultimate conclusion that he had "no alternative than to deny the motion" (R51), was legally and factually wrong, and McFadden asked the district court to reverse and remand for a new hearing before a different trial judge.

The Second District Court of Appeal issued an opinion on November 8, 2013, affirming the denial of the motion to reduce McFadden's sentence. McFadden v. State, 130 So. 3d 697 (Fla. 2d DCA 2013). The court addressed whether the trial court's order was appealable at all. Citing a 1996 case from the U.S. Eleventh Circuit Court of Appeals, the Second District opined that an order arising out of a section 921.186 proceeding is appealable "where the defendant alleges, as McFadden has here, that the trial court misapplied the statute." But, while acknowledging that McFadden's claim was that the trial court based its denial of the motion on improper factors, the Second District stated that it agreed with the First District that "the decision to reduce or suspend a defendant's sentence falls squarely within the discretion of the trial court."

The Second District certified conflict "with the First

District's opinion in Cooper v. State, 106 So. 3d 32, 32 (Fla. 1st DCA 2013), which holds 'that orders denying motions filed pursuant to section 921.186, Florida Statutes, are not appealable.'"

McFadden's motions for rehearing and rehearing en banc were denied on December 16, 2013.

SUMMARY OF THE ARGUMENT

This Court should quash the opinion of the Second District in this case for two reasons. First, the Second District has failed to realize its full jurisdictional authority to review final circuit court orders arising out of proceedings that are initiated by the State Attorney through section 921.186, Florida Statutes (2010). The jurisdiction of the district court is conferred by the Florida Constitution. The federal case cited by the Second District in its opinion under review has no bearing on the issue of the district court's authority or scope of jurisdiction over the final order entered by the circuit court in this case. Likewise, the First District's dismissal for lack of jurisdiction in Cooper v. State, 106 So. 3d 32 (Fla. 1st DCA 2013), constitutes a failure of that court to realize its jurisdictional authority to review an order arising from the denial of a motion filed under section 921.186.

This Court should quash the opinion under review for the additional reason that the Second District applied the wrong standard of review to a claim involving a trial court's use of improper factors to base a sentencing decision. McFadden's right to due process was violated when the trial court denied his motion for improper reasons. McFadden showed on appeal that the trial court ruled against him because the judge did not like the new substantial assistance statute and disapproved of the prosecutor's utilization of it in this case. The issue required de novo review

and reversal for a new hearing before a different judge. However, the Second District affirmed, while indicating the trial judge had the discretion to deny the motion, stating: "we agree with the First District that the decision to reduce or suspend a defendant's sentence falls squarely within the discretion of the trial court." This statement creates conflict and confusion with regard to the proper standard of review of a claim involving use of improper factors in sentencing decisions.

ARGUMENT

ISSUE

THIS COURT SHOULD (1) RESOLVE THE CERTIFIED CONFLICT BY HOLDING THAT DISTRICT COURTS HAVE JURISDICTION TO REVIEW A CIRCUIT COURT'S FINAL ORDER ARISING FROM A SECTION 921.186 PROCEEDING, AND (2) QUASH THE OPINION BECAUSE THE DISTRICT COURT FAILED TO APPLY THE DE NOVO STANDARD OF REVIEW TO THE PURE QUESTION OF LAW IMPLICATED BY THE DENIAL OF THE STATE'S MOTION.

(1) Conflict Based on Jurisdictional Authority of District Court

The jurisdictional issue in this case is grounded in the Florida Constitution. See Art. V, § 4(b)(1), Fla. Const. ("District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts . . . not directly appealable to the supreme court or a circuit court."); see also Robbins v. Cipes, 181 So. 2d 521, 522 (Fla. 1966) ("Appeals to the Supreme Court and the District Courts of Appeal are constitutionally guaranteed rights in this State.").

Although the state attorney initiated the proceeding in the trial court and asked the court to reduce McFadden's sentence, the Assistant Attorney General took a position contrary to that of McFadden in the district court, asserting that the court lacked jurisdiction to review the final order denying the State's motion. The Second District held that it had some limited jurisdiction (which depended upon the issue being presented for appeal), and it

certified conflict with the First District's opinion in Cooper v. State, 106 So. 3d 32 (Fla. 1st DCA 2013), wherein the court dismissed an appeal from a section 921.186 proceeding based on lack of jurisdiction. Both the Second and the First District Courts of Appeal have failed to realize their full jurisdictional authority and obligation to review a final order denying the State's motion filed under section 921.186.

Section 921.186, enacted by Laws 2010, c. 2010-218, § 1, eff. July 1, 2010, gives the State Attorney broad authority to move a sentencing court to reduce or suspend the sentence of any person who provides substantial assistance in the prosecution of another. The statute provides:

> Notwithstanding any other law, the state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of violating any felony offense and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in criminal activity that would constitute a felony. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

(Emphasis added).

Once the State Attorney files a motion under section 921.186, a new cause is initiated that confers jurisdiction on the trial court for which a defendant is entitled to due process. McFadden complied with his end of the bargain by providing

substantial assistance to the State in exchange for the State's promise to file the motion. Once the motion was filed, the trial judge had a duty to fairly adjudicate the motion based on the terms of the statute.

In its opinion, the Second District cites a federal case from 1996 as authority for its decision on the jurisdictional question. This citation illustrates the court's profound misunderstanding of the jurisdictional question. United States v. Manella, 86 F.3d 201 (11th Cir. 1996), sheds no light on whether the Second District has jurisdiction to review the order entered by the trial court. The Manella decision is grounded in distinct federal statutory provisions, whereas the jurisdictional question in this case is grounded in the Florida Constitution.

The First District in Cooper likened the appeal from the denial of a motion filed under section 921.186, Florida Statutes, to the appeal of a motion filed under Florida Rule of Criminal Procedure 3.800(c), and held that any order arising out of a motion filed under section 921.186 is nonappealable. Cooper is wrongly decided because the statute confers substantive and procedural rights and obligations that distinguish it from a motion to mitigate filed by a defendant under rule 3.800(c).

Unlike rule 3.800(c), which is a procedural rule that deals with 60 and 90 day time limits on a trial court's jurisdiction to reduce or modify a sentence, section 921.186 can be invoked only by the State Attorney, and it can be invoked at any time. A State Attorney may invoke the statute years after a

conviction and sentence are final, thereby restoring jurisdiction over a final criminal case to a circuit court. This is a difference between the statute and rule 3.800(c), and it is one of many reasons why the statute and rule 3.800(c) cannot be treated the same for appellate purposes, as the First District did in Cooper.

Section 921.186 substantively changes the possible legal sentence for a person convicted of a felony. Unlike rule 3.800(c), which does not change the substance of any sentencing laws governing a case, the invocation of the circuit court's jurisdiction under section 921.186 changes the legal limits (the sentencing floor) governing a felony case and overrides all other sentencing provisions. This statute gives a sentencing judge renewed jurisdiction over a previously final sentence for any felony offense and gives the judge the power to suspend the sentence entirely or reduce the sentence by any amount without regard for minimum mandatory provisions or any other statutory constrictions on the court's sentencing discretion. In contrast, rule 3.800(c) confers no change to the substantive sentencing laws that govern the conviction. The rule says explicitly that it is "not applicable to . . . those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion." And the rule is not applicable in cases in which the defendant was sentenced pursuant to a plea agreement. See State v. Brooks, 890 So. 2d 503 (Fla. 2d DCA 2005).

Unlike rule 3.800(c), the filing of a motion under

section 921.186 provides a new and discrete basis for jurisdiction in the trial court. And, based on the plain language of the statute, a hearing must be held on the motion. The State Attorney's motion filed under this section initiates a de novo sentencing proceeding with entirely new parameters defining the contours of a legal sentence. Contrast this with the treatment of a motion filed under rule 3.800(c), for which no hearing is required or allowed in most cases, and it is clear that section 921.186 proceedings require a completely different and greater degree of due process.

Rule 3.800(c) motions are generally filed by defendants in a one-sided attempt to get a reduced sentence. In contrast, before the section 921.186 motion is filed by the State Attorney, a relationship is forged between the parties and the Defendant has given consideration to the State Attorney in the form of his service in providing substantial assistance. The trial judge, when considering the uncontested motion, has the duty to comply with the terms of the statute, to entertain the State's motion as an impartial jurist, to hold a hearing, and to decide initially whether the Defendant performed substantial assistance.

There are many issues implicated by the statute that must be subject to review upon entry of a final order. The statute changes the legal structure for what is a permissible penalty for the crime, and it creates a right to a de novo sentencing hearing, the result of which must be subject to appeal. If the trial judge refused to hear the motion at all and denied

the motion without a hearing, the resulting final order would have to be subject to de novo review. For the First District to say in Cooper that no order entered on a motion filed pursuant to section 921.186 can be appealed and for the Second District to say in this case that an appeal can be taken for a limited purpose shows that both courts misunderstand the import of the statute, the trial court's obligations under the statute, and the appellate court's responsibility to exercise its jurisdiction to review the trial judge's order.

A district court has jurisdiction to hear challenges to the lawfulness of the method used by a circuit court in making a sentencing decision. See, e.g., Ritter v. State, 885 So. 2d 413, 414 (Fla. 1st DCA 2004) (holding that a trial court's reliance on impermissible sentencing factors, i.e., that a defendant continues to maintain his innocence and is unwilling to admit guilt, violates a defendant's due process rights and is an issue that is cognizable on direct appeal). This Court should quash the Second District's opinion to the extent that it fails to realize the full appellate jurisdiction and obligation of the district court to review the final orders from proceedings arising under section 921.186.

B. Conflict Based on Standard of Review

The circuit judge made remarks indicating that he ruled against McFadden because the judge disagreed with the Legislature's enactment of the new statute and with the prosecutor's exercise of his legal authority pursuant to the

statute. A pure question of law is implicated by the issue of whether a trial judge based a ruling on improper factors. But the Second District opined that any decision on a motion filed by the State under section 921.186 would "fall squarely within the discretion of the trial court." By this statement, the opinion brings conflict and confusion to the established standard of review for the error alleged by McFadden.

In another case involving sentencing error, this Court has said that a de novo standard of review applies to a question of law such as whether a trial court violated due process by applying an "arbitrary policy of rounding up sentences." See Cromartie v. State, 70 So. 3d 559, 563 (Fla. 2011). In Cromartie, the judge's stated policy was a violation of due process and constituted fundamental error. Id.

The First District followed Cromartie and employed a de novo standard of review to reverse a sentence in Pressley v. State, 73 So. 3d 834, 836 (Fla. 1st DCA 2011), where the trial court's stated policy of not considering "boot camp," a type of youthful offender sentence, without any reflection on the individual merits of the defendant's case was arbitrary and a denial of due process. The court stated that the error "goes to the foundation of the judicial decision, and by its nature focuses on the qualitative effect on the sentencing process and its quantitative effect on the sentence." 73 So. 3d at 838.

Likewise, the Second District followed Cromartie and recognized that a de novo standard of review was appropriate in a

case involving sentencing error because, the court stated, "the issue here revolves around the trial court's applying an incorrect standard in determining whether to exercise its discretion." Barnhill v. State, 2D12-5108, 2014 WL 2536826 (Fla. 2d DCA June 6, 2014).

In Sims v. State, 998 So. 2d 494, 504 (Fla. 2008), this Court held that a trial court's decision on whether to impose victim-injury points is subject to an abuse-of-discretion standard. But a claim that the trial court did not follow the law and instead misinterpreted statutory sentencing provisions "is a pure question of law, which is subject to de novo review." Id. at 504.

In Sanders v. State, 35 So. 3d 864, 868 (Fla. 2010), this Court reaffirmed that a legal question, requiring interpretation of statutes and rules of criminal procedure, is a pure question of law, which is subject to de novo review. See also Hilton v. State, 961 So. 2d 284, 288 (Fla. 2007) ("Statutory interpretation is a question of law subject to de novo review.").

If the trial judge in this case had denied the State's motion because the judge disagreed with the defendant's religion or political affiliation, the resulting denial would have to be subject to de novo review.

> Although an appellate court generally may not review a sentence that is within statutory limits, an exception exists when the trial court considers constitutionally impermissible factors in imposing a sentence. Nawaz v. State, 28 So. 3d 122, 124 (Fla. 1st DCA 2010). Reliance on constitutionally impermissible factors is a violation of a defendant's due process rights. See Ritter v. State, 885 So. 2d 413, 414 (Fla.

> 1st DCA 2004); see also Holton v. State, 573 So. 2d 284, 292 (Fla. 1990). Examples of factors that are constitutionally impermissible or totally irrelevant to the sentencing process include the race, religion or political affiliation of the defendant.

Santisteban v. State, 72 So. 3d 187, 197 (Fla. 4th DCA 2011).

Here, the trial judge denied the motion for a number of improper reasons, including disagreement with the Florida Legislature and the State Attorney's exercise of authority. McFadden raised a legal issue in the Second District Court of Appeal, for which he was entitled to de novo review. Instead, the Second District indicated that the ruling fell "squarely within the discretion of the trial court." The Second District's opinion conflicts with Cromartie, Pressley, Sims, Sanders, Hilton, and Santisteban because it holds that a trial court has the *discretion* to deny a motion to reduce a sentence of an inmate who provides substantial assistance to the State, even where the trial court's ruling rests on *improper factors*. A trial judge cannot be granted discretion to disregard the law.

Judge Schoonover's order rested on improper factors. His questions and remarks show that improper considerations were used to deny the State's motion to reduce or suspend McFadden's sentence. The judge's statements indicate clear disagreement with the philosophy behind the statute and the prosecutor's decision to employ the statutory tool to prosecute McFadden's more culpable codefendant here.

Section 921.186 gives prosecutors wide latitude to seek substantial assistance from an inmate. A House of Representatives Staff Analysis of the bill (CS/HB 615) recognizes a number of

provisions in Florida law tied to specific crimes (e.g., §§ 893.135(4), 790.165(3), 817.568(11), Fla. Stat.) that permit the state attorney to move the sentencing court to reduce or suspend a sentence for substantial assistance. Section 921.186 broadens the State Attorneys' power, enabling them to move for a reduction of sentence for any felony. The staff analysis mentions Rule 35 of the Federal Rules of Criminal Procedure that similarly gives broad power to federal prosecutors.

Here, Judge Schoonover indicated that the new statute should be "attacked," although neither party was likely to attack the statute because it benefited both sides. And if history is a guide, the statute is likely to survive constitutional attacks, as many attacks on other substantial assistance statutes have been rejected. See, e.g., State v. Benitez, 395 So. 2d 514 (Fla. 1981) (rejecting separation of powers and equal protection challenges to substantial assistance provision in section 893.135, Fla. Stat. (1979)).

Then the judge indicated concern that the statute would cause everyone in prison to contact the State in an effort to get a deal, which the judge thought was problematic. The prosecutor explained that such contacts occurred regularly.

The court also questioned whether the statute could only be used during a specific time period, or within a statute of limitations, as the court put it. The prosecutor explained that the statute imposed no such limitation.

In looking at the facts of this case, the court

questioned whether the prosecutor really needed McFadden's cooperation. ("So what substantial assistance did he give you? You already had it." (R20)). The prosecutor was forced to defend his discretionary decision to file the motion, explaining that the Confrontation Clause did not allow use of McFadden's own trial testimony at a different trial for McSwain. But the court continued second-guessing the prosecutor's decision, saying, "And you couldn't have just called and said McSwain's trial is here, are you willing to testify; you couldn't have done that first?" (R21). When the prosecutor responded that he would not have proceeded that way, the judge stated: "I'm just trying to avoid a tit for tat so to speak, a deal either threatening or promising anything." (R22).

None of the concerns voiced by the court were valid considerations for the court to rest its decision on whether or not to grant the State's motion in this case. The judge's remarks indicate that he was considering factors that were not within the purview of the court since the decision to ask for reduced sentence is solely up to the discretion of the prosecutor. It was not the trial court's role to second guess the prosecutor's discretionary decision to seek a reduction of sentence for McFadden. See State v. Werner, 402 So. 2d 386, 387 (Fla. 1981) (noting that state attorneys "must have broad discretion in performing their duties," and that "[d]iscretion to initiate the post-conviction information bargaining process is inherent in the prosecutorial function"); Mack v. State, 504 So. 2d 1252, 1253

(Fla. 1st DCA 1986) (recognizing the broad discretion given to the state attorney in the determination of whether to initiate a request for suspension or reduction under the substantial assistance provision of the drug trafficking statute).

It is well-established in criminal law that a trial judge should not put himself in the role of a prosecutor. "We emphasize that it is not the trial court's function to substitute its judgment for that of the state attorney on the issue of substantial assistance." Ruth v. State, 574 So. 2d 225, 229 (Fla. 2d DCA 1991). The judge's remarks indicate that by trying to "avoid a tit for tat," the judge was indeed treading into the prosecutor's territory, instead of being an unbiased magistrate over the State's uncontested motion.

The judge also questioned why McFadden did not come forward and volunteer cooperation before his own trial. Again, this question was not within the purview of the court. Any substantial assistance motion contemplated by the instant statute necessarily involves events occurring after the trial. The defendant's procedural choices before his conviction can play no role in deciding a substantial assistance motion. In fact, the judge's comments indicate that he was violating McFadden's right to due process by considering the fact that McFadden exercised his right to trial. Consideration of such as a sentencing factor is a due process violation and fundamental error. See Moorer v. State, 926 So. 2d 475 (Fla. 1st DCA 2006)(reversing for resentencing because judge's comments suggested that sentence was the result of

defendant's exercise of right to trial); Ritter v. State, 885 So. 2d 413, 414 (Fla. 1st DCA 2004)(holding it is constitutionally impermissible for trial judge to consider and give weight to the fact that a defendant maintained his innocence and was unwilling to admit guilt); Johnson v. State, 120 So. 3d 629, 632 (Fla. 2d DCA 2013) ("improper considerations by the trial judge undermine our confidence in the outcome of the sentencing proceeding"); Bracero v. State, 10 So. 3d 664, 665 (Fla. 2d DCA 2009) (finding fundamental error where "the judge's comments demonstrated that the lengths of the sentences were improperly based on Bracero's continued protestations of innocence"); Hannum v. State, 13 So. 3d 132 (Fla. 2d DCA 2009) (holding that improper consideration of the fact that Hannum maintained his innocence and refused to take responsibility for his actions was equivalent to a denial of due process); Johnson v. State, 948 So. 2d 1014 (Fla. 3d DCA 2007) (holding that due process was violated when trial court weighed protestation of innocence in considering request for a downward departure sentence).

The trial judge's expressed concern that the substantial assistance given by McFadden could be negated in the future if McSwain were able to withdraw his plea was based on speculation and, again, was irrelevant to the question before the court. By engaging in this type of speculation, the court was second-guessing the wisdom of the legislature and the prosecutor. In any criminal case, a convicted person (like McSwain) could potentially withdraw his plea or win an appeal, but such future

contingencies have no bearing on the only proper question before the court: whether McFadden gave substantial assistance to the State Attorney to gain the conviction of the codefendant.

The court's cryptic conclusion that it had no alternative than to deny the State's motion has no basis in law or fact. The trial judge had the alternative to grant the motion and his statement to the contrary indicates either that he mistakenly determined that he did not have the discretion to reduce the sentence or that he chose to deny the motion for reasons other than the law and facts appearing in the record. In either case, reversal was required.

McFadden has a liberty interest in the proper exercise of the trial judge's sentencing discretion; due process is violated when a judge fails to exercise the discretion given him under state law. Hickerson v. Maggio, 691 F.2d 792 (5th Cir. 1982); Williams v. Maggio, 730 F.2d 1048, 1049 (5th Cir. 1984) (holding that "imposition of a sentence in ignorance of discretionary alternatives . . . violate[s] due process"). It is impossible to tell if the judge would have granted the motion had he understood his discretion to do so. See Kezal v. State, 42 So. 3d 252, 254 (Fla. 2d DCA 2010) ("If the trial court mistakenly believes that it legally does not have the discretion to depart and the reviewing court is unable to determine whether the trial court would have imposed the same sentence if it had understood its discretion, then the sentence imposed must be vacated and the case remanded for resentencing."). And, if the judge denied the

motion for reasons other than law and the facts appearing in the record, then reversal is required because the judge failed to follow the law.

The statute provides that "[t]he judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance." Under the express terms of the statute, then, a finding of whether the defendant rendered substantial assistance is necessary as the threshold question. For example, in Parrish v. State, 12 P.3d 953 (Nev. 2000), the Supreme Court of Nevada addressed a similar situation where a trial judge failed to make a finding on whether the defendant provided substantial assistance as he claimed. The appellate court noted that "[b]ased upon the state of the record, we are unable to determine whether the [trial] court erred in its application of the law or alternatively, whether the [trial] court found that Parrish had provided substantial assistance but, in its discretion, denied his motion for a reduced or suspended sentence." 12 P.3d at 984-85. The ambiguous record compelled the conclusion that a new sentencing hearing was needed before a different trial judge. Id. at 985. The Parrish court announced that a trial court must expressly state its finding as to whether or not substantial assistance has been provided. Id. at 959.

The proper adjudication of the State's motion here also required the trial judge to make a finding as to whether McFadden provided substantial assistance. It would be hard to find any reason for the judge to fail to conclude that substantial

assistance was given in this case, considering the prosecutor's emphatic assertion that the case against the more culpable defendant, McSwain, would have been nol prossed but for the assistance provided by McFadden. But instead of determining that substantial assistance was provided by McFadden, the trial judge made no finding and took issue with the motion and the statute authorizing the relief sought. The Court ultimately denied the motion, stating: "the Court finds it has no alternative than to deny the motion." (R51).

Because the trial judge failed to make the required finding and based his decision instead on his disagreement with the philosophy behind the substantial assistance statute, the prosecutor's decision to utilize the statute, and other improper factors, he ultimately erred when he concluded that he had no alternative than to deny the motion to reduce or suspend the sentence. This court should quash the opinion and direct the Second District to remand for a new hearing in the trial court on the State's motion.

CONCLUSION

Petitioner, Darrick McFadden, respectfully requests this Court to quash the opinion of the Second District with directions to reverse and remand to the trial court for a new hearing on the State's motion to reduce or suspend McFadden's sentence.

APPENDIX

	PAGE NO.
1. McFadden v. State, 130 So. 3d 697 (Fla. 2d DCA 2013)	1

130 So.3d 697
District Court of Appeal of Florida,
Second District.

Darrick L. McFADDEN, Appellant,
v.
STATE of Florida, Appellee.

No. 2D11–6172. | Nov. 8, 2013. | Rehearing Denied Dec. 16, 2013.

Synopsis
Background: State filed motion to reduce or suspend defendant's sentence for providing substantial assistance. The Circuit Court, Lee County, Jack R. Schoonover, Associate Senior Judge, denied the motion. Defendant appealed.

Holding: The District Court of Appeal, Black, J., held that District Court of Appeal had jurisdiction to review trial court's denial of the motion.

Affirmed.

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, and Timothy A. Freeland, Assistant Attorney General, Tampa, for Appellee.

Opinion

BLACK, Judge.

Darrick L. McFadden appeals the trial court's order denying the State's motion filed pursuant to section 921.186, Florida Statutes (2010), to reduce or suspend his sentence for providing substantial assistance. We affirm the trial court's order without comment. In so affirming, however, we certify conflict with the First District's opinion in *Cooper v. State*, 106 So.3d 32, 32 (Fla. 1st DCA 2013), which holds "that orders denying motions filed pursuant to section 921.186, Florida Statutes, are not appealable."

McFadden argues on appeal that the trial court erred because it based the denial upon the consideration of improper factors. Though we agree with the First District that the decision to reduce or suspend a defendant's sentence falls squarely within the discretion of the trial court, *see Cooper*, 106 So.3d at 32, we nonetheless hold that we have jurisdiction to review a trial court's order denying a motion filed pursuant to section 921.186 where the defendant alleges, as McFadden has here, that the trial court misapplied the statute. *See United States v. Manella*, 86 F.3d 201, 203 (11th Cir.1996) (holding that although the lower court's decision to grant or deny the government's motion to reduce the defendant's sentence for providing substantial assistance "is a discretionary one from which an appeal generally will not lie," the appellate court's exercise of jurisdiction to review the order is proper where the defendant has alleged a misapplication of the law).

To the extent that *Cooper* holds that an order denying a motion filed pursuant to section 921.186 is never appealable, we certify conflict.

Affirmed; conflict certified.

DAVIS, C.J., and ALTENBERND, J., Concur.

Parallel Citations

38 Fla. L. Weekly D2333

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Timothy Freeland at the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 3rd day of July, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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