

IN THE SUPREME COURT OF FLORIDA

BENNIE RAY SMITH,

Petitioner,

v.

CASE NO. 71,3⁷~~62~~

STATE OF FLORIDA,

Respondent.

DEC 21 1981
CLERK OF THE SUPREME COURT
By [Signature]
Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1,2
SUMMARY OF ARGUMENT	3
ARGUMENT	
<u>ISSUE</u>	
A PLEA AGREEMENT, PROVIDING ONLY FOR A SENTENCE WITHIN A TERM LESS THAN THE STATUTORY MAXIMUM FOR A SINGLE CHARGED OFFENSE, IS AN ADEQUATE REASON FOR EXCEEDING THE GUIDELINES (ANSWERING THE CERTIFIED QUESTION IN THE AF- FIRMATIVE).	4-6
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Coates v. State,</u> 458 So.2d 1219 (Fla. 1st DCA 1984)	5
<u>Curry v. Wilson,</u> 405 F.2d 110 (9th Cir. 1968)	4
<u>State v. Jones,</u> 204 So.2d 515 (Fla. 1967)	5
<u>State v. Whitfield,</u> 487 So.2d 1045 (Fla. 1986)	4

OTHER AUTHORITIES

Sec. 812.13, Florida Statutes	1
-------------------------------	---

STATEMENT OF THE CASE AND FACTS

Bennie Ray Smith was charged by information with armed robbery (with a firearm) in violation of Section 812.13, Fla.Stat.. (R-7). The crime is a first degree felony punishable by life, but the "guidelines" (incredibly) treat the offense as a third-degree felony punishable by 3-1/2 to 4-1/2 years. (R-23). Given Smith's prior felony record, and the fact he was under legal restraint during this robbery, the "guidelines" enhanced his sentence by a whopping six months to one year, making the range 4-1/2 to 5-1/2 years and the suggested sentence only five (5) years. (R-23).

The State announced its intention to seek the legal sentence of life imprisonment if Smith went to trial. (Tr-7). If Smith pled, he was promised no more than twenty (20) years. (Tr-6).

Smith, who was represented by counsel and fully discussed the plea with him (Tr-6-8), accepted the plea. After entering the plea, Smith appealed, contending that he was entitled to a "guidelines" sentence.

The District Court of Appeal found the trial court's "stated" grounds for departure insufficient and remanded the case for resentencing.

On resentencing, Smith testified that he realized the "guidelines" called for only 4-1/2 to 5-1/2 year sentence. (Tr-7). He knew the State would seek departure. (Tr-7).

He discussed the case with counsel. (Tr-7). He knew he was pleading to a "cap" of twenty (20) years. (Tr-7). He was pleading to avoid a possible life sentence. (Tr-7).

The only "coercion" felt by Smith, as conceded by counsel (Tr-8) and found by the Court (Tr-9), was the "standard coercion" facing any defendant; to-wit: the possibility of a greater sentence following trial.

Smith refused to withdraw his guilty plea.

Smith was resentenced to only twelve (12) years, well under the twenty (20) years cap. (Tr-14).

Smith appealed again, but lost, although the question now pending was certified.

SUMMARY OF ARGUMENT

The State of Florida and Bennie Ray Smith (represented by counsel), entered into a plea bargain agreed to by both parties and founded upon the strength of the State's case.

Now, Smith wants the State to accept his plea but forego the agreed sentence, forcing the State to accept a guidelines sentence.

We submit that the plea bargain was valid, but if this Court disagrees, then we submit the entire plea should be voided and the parties restored to their original positions.

ARGUMENT

ISSUE

A PLEA AGREEMENT, PROVIDING ONLY FOR A SENTENCE WITHIN A TERM LESS THAN THE STATUTORY MAXIMUM FOR A SINGLE CHARGED OFFENSE, IS AN ADEQUATE REASON FOR EXCEEDING THE GUIDELINES (ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE).

The State shall open its brief with a restatement of its position in the trial and district courts.

We entered into a good faith plea bargain with Mr. Smith foregoing the presentation of evidence in support of a life sentence in exchange for Smith's word that he would accept any sentence up to a twenty (20) year cap. Smith was represented by counsel and, courtesy of his appeals, had two plea hearings in which he could have withdrawn his plea or objected to his sentence. Neither was done.

It is a total "perversion of justice", Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968), to suggest that Smith can compel the State to abide by the plea bargain on the one hand, yet be excused from accepting the imposed sentence simply because he does not happen to like it.

Citing to State v. Whitfield, 487 So.2d 1045 (Fla. 1986), Smith contends that the State could not justify a "departure" from the guidelines and, therefore, should be denied good faith performance of the plea by Mr. Smith. This sly assertion relies heavily upon the fact that a guilty plea was taken so, naturally, no additional evidence was introduced.

As we stated below, if Smith will not abide by the plea bargain then we, too, should be released to put Smith on trial, present our evidence and try to prove the propriety of a sentence which exceeds the guidelines sentence. Justice, though due to the accused, is also due to the accuser. State v. Jones, 204 So.2d 515 (Fla. 1967).

Smith, however, wants to have his cake and eat it too. Citing to Coates v. State, 458 So.2d 1219 (Fla. 1st DCA 1984), Smith alleges he can not be expected to plead to a "cap" as opposed to a fixed sentence. Coates does not say this.

In Coates, a defendant was placed on probation pursuant to a scheme in which he waived the guidelines "in the future" if he ever violated probation, thus exposing himself to a possible twenty (20) year sentence for even a minor technical violation.

No such uncertainty exists here. While, like Coates, Smith faced a possible "cap", two factors distinguish this case:

(1) Smith was pleading to a "cap" crime, not a future one,

and

(2) Smith, while pleading to a "cap", was guaranteed less than the statutory (legal) sentence of "life".

The impact of a ruling for Mr. Smith would be to outlaw "open" guilty pleas (wherein sentences would be imposed only after a "PSI" or consideration of mitigating evidence) and

force every plea to be for a firm "guidelines" sentence. Under this system, there would be no incentive for anyone to plea bargain. No benefit would accrue to the public; but trial courts would be jammed by cases proceeding to trial.

If the agreed plea bargain can not be upheld, then both parties should be released, not just Mr. Smith. While the State believes that a defendant may plead to a statutory (thus legal) sentence even if it exceeds the guidelines, we submit that if that is not true, then the contract at bar should be voided and the parties restored to their original position.

CONCLUSION

The certified question should be answered in the affirmative or the entire plea agreement should be voided.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



MARK C. MENSER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Pamela D. Presnell, Esq., Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 10th day of December, 1987.



MARK C. MENSER
Assistant Attorney General

OF COUNSEL