

OA 9-5-91

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MAY 23 1991

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,825

MILTON B. THOMAS,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the criminal division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida and the Fourth District Court of Appeal, respectively.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal, except that Respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"PB"	Petitioner's Brief

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement of the case and facts as substantially true and correct but would make the following additions, clarifications and modifications:

The Court did not "warn" (PB 2) or "caution" (PB 7) the State but merely advised it that if the State did not recommend what it and the defendant agreed to, the plea could be withdrawn (R 19).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying Petitioner's motion to withdraw his plea. The recommendation of the Department of Corrections pursuant to a Presentence Investigation ("PSI") was separate and apart from the agreement between the State and Petitioner. A recommendation within a PSI cannot be considered a breach of the plea agreement between the parties as PSI reports are often mandated and will generally support a stiffer sentence based on points. The Petitioner was on notice that a PSI was to be prepared and must have anticipated that his prior criminal history would affect the PSI.

Further, regardless of whether the Department of Corrections is deemed an agent of the State for purposes of plea agreements, the State fulfilled its end of the bargain by reasserting its recommendation. Although its reassertion may not have been strenuous, its agreed upon recommendation was clearly conveyed to the trial judge.

ARGUMENT

**THE TRIAL COURT WAS CORRECT IN DENYING
PETITIONER'S MOTION TO WITHDRAW HIS
NOLO CONTENDERE PLEA AS THE STATE DID
NOT BREACH ITS PLEA AGREEMENT.**

The Petitioner entered into an open plea agreement with the State Attorney whereby he would plea nolo contendere in exchange for a recommendation of four months incarceration, followed by probation with a special condition that restitution be made (R 2-5, 32-36). At that time, Petitioner was fully advised that the Court need not accept the State's sentencing recommendation (R 3, 32-36) and that a presentence investigation (PSI) was going to be ordered (R 4, 32-36). Pursuant to the presentence investigation ("PSI"), the Department of Corrections (DOC) recommended three years incarceration (R 8). Although this court has held that an "agent" of the State cannot make a recommendation contrary to that of the State, the DOC is not such an agent. DOC was not a party to the plea agreement and Petitioner never contended that an agreement with the prosecutor obligated any and every State agency. Further, the State fulfilled its promise by reasserting its original recommended plea at sentencing.

This court held in Lee v. State, 501 So.2d 591 (Fla. 1987) that the recommendation of a law enforcement officer in a presentence report, contrary to the plea agreement of the State, constituted a breach of the agreement and entitled the defendant

to withdraw his plea. This court stated that such a breach occurs if any "agent" of the State fails to honor a plea agreement.

However, the DOC cannot be deemed such an agent. DOC does not work in concert with the State Attorney's office in the way that a law enforcement office does. The Department of Corrections and Probation and Parole, which is an arm of the DOC, is totally independent and acts as a separate agency from the State Attorney's office. It prepares the PSI at the request of the judge and is no more an agent of the State than the victim. If DOC was deemed such an agent as petitioner contends, anytime a PSI was ordered reflecting a greater sentence, the defendant could claim foul.

Further, despite petitioner's reliance on, and in contrast to, Fortini v. State, 472 So.2d 1383 (Fla. 4th DCA 1985), the DOC was not a party to the plea agreement and defense counsel below never alleged that he and his client understood the agreement to include everyone connected with the State. After all, Petitioner knew a PSI was to be prepared and should have anticipated the affect his criminal history would have on the PSI.

In Curry v. State, 513 So.2d 204 (Fla. 4th DCA 1987), the PSI prepared by the Parole and Probation Commission recommended a much harsher sentence than the original plea. At sentencing, the State argued the defendant should not be permitted to withdraw his plea and, at the same time, did not

reassert its prior agreement. The Fourth District held that the State violated its plea agreement, not by Parole and Probation being an agent of the State - in fact, this was never discussed - but by remaining silent, while the PSI spoke of a recommendation contrary to the State's recommendation. As the focus in Curry was on the fact that the State remained silent, and not on what an agent of the State is, Curry is clearly distinguishable from the case at bar.

However, regardless of DOC's status as an agent of the State, at sentencing the State not only did not affirmatively recommend anything greater than the original four month arrangement but, in fact, reasserted its original bargain, unlike the State in Curry (R 16-17, 19). Petitioner's claims to the contrary are quite misleading and do not reflect an accurate reading of the transcript (PB 5-8, 11). In particular, the State did not "change" its position at sentencing (PB 7) and the trial judge did not "warn" (PB 2), "caution" (PB 7), or "repeatedly remind" (PB 12) the State Attorney that her failure to abide by the plea agreement constituted a breach (PB 7). Such terms by Petitioner -warn, caution, repeatedly remind, failure to abide- carry a negative connotation and imply that the judge was admonishing the prosecutor. A review of the transcript plainly demonstrates that Petitioner's depiction was not at all the atmosphere at the hearing:

May 22, 1989:

THE COURT: Okay, I think Milton Thomas.

THE CLERK: Case 89-12, Milton Thomas.

UNIDENTIFIED VOICE: Your Honor, here is the prepared order from the (inaudible).

THE CLERK: Okay, Milton Thomas is here having entered a plea of no contest to battery on a law enforcement officer, a felony of the third degree.

Mr. Unruh, is there any legal reason why he should not now be sentenced?

MR. UNRUH: None that I'm aware of at this time, Your Honor.

THE COURT: Okay, this case involved where he was in jail and hit a corrections officer on the nose. 175 point, two and a half to three and a half years grid. Do we agree, Ms. Larson?

MS. LARSON: Actually, Your Honor, I think it's 168 points. It does not affect the grid, it's seven points less than the sheet according to my calculations, but it does not affect the grid.

THE COURT: Okay, do you agree then, Mr. Unruh?

MR. UNRUH: I came up with like 157 but, again, it doesn't affect the grid.

THE COURT: Okay. What's the State's recommendation?

MS. LARSON: Your Honor, the State--the points did come out higher than we had originally anticipated. The State is going to stand silent and leave the sentence to the court. We are asking for restitution in the amount of \$4,431. And that was paid by workmen's compensation because this was a correctional officer and was covered by the program.

We'd also ask that he be placed on probation in order to pay that restitution after his sentence is served.

THE COURT: All right. Mr. Unruh, what's your recommendation?

MR. UNRUH: Well, Your Honor, we'd like to again stress the defendant's belief-- or the defense belief that the Probation and Parole Department is an agency of the state. And again, here we have the State Attorney standing mute instead of affirmatively recommending the original recommendation. I believe again we have grounds to withdraw our plea in light of--however, in light of the motion we argued last Friday we'll go ahead. The defendant in this case--he was arrested on an unlawful reason. He was arrested on a misdemeanor trespass and he was on the public streets and warned to be off the streets and was picked up and brought in and that case of course was later no informationed but because of that original unlawful arrest led up to the scuffle which ensued and led up to the charge which you have Mr. Thomas before you now...

We'd ask that the court follow the original plea agreement of four months to be followed by the probation. In fact, he's been in longer than four months now at this time, Your Honor.

THE COURT: All right, Mr. Thomas, anything you'd like to say about your sentence?

THE DEFENDANT: I'd like to say that I think that a lot of what he's saying, that's about what I wanted to say, Your Honor.

THE COURT: All right. Well, I think that under the case law the State has to recommend what they agreed to recommend, if you don't they can withdraw the plea under the case--so, I don't know if the State wants to recommend--in other words, I think the case law is clear where you don't recommend what you agreed to, then the plea can be withdrawn.

MS. LARSON: Well, the State is not going to recommend--it's not going to agree that for a written reason that the judge can go underneath the guidelines. That was the original plea agreement and I am standing silent so I am not affirmatively recommending anything more than a four month period. However, the State is not agreeing that--that the court could use the State's recommendation as a reason to go underneath the guidelines.

MR. UNRUH: Your Honor, here's Curry v. State right here where the State stands silent and--

THE COURT: Yeah, I know.

MR. UNRUH: Okay, well, I'll just--

MS. LARSON: Well, Your Honor, I'll recommend four months but I'm not agreeing that to be a written reason to go underneath the guidelines.

THE COURT: All right, Milton B. Thomas, the State's recommending four months according to their original agreement.
(R 32-36)

* * *

While the State's recommendation may not have been vigorous, it was hardly a changed position, as Petitioner suggests (PB 7). In fact, the State not only did reassert the bargain (R 36), but it also advised the trial judge that the actual points were less than DOC had calculated, although it would not affect the grid (R 16).

As to Petitioner's final claim of conflict between the the decision below and those of Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988) and State v. Newsome, 549 So.2d 818 (Fla. 2d

DCA 1989), any such conflict should be resolved in favor of the State. The Petitioner below was clearly and unambiguously advised of the bargain and his potential for a guideline sentence (R 32-36). What meaning would any such plea agreements have if defendants were consistently allowed to withdraw their plea when the judge sentenced the offender within the guidelines pursuant to the PSI. The PSI is often an integral part of sentencing. As with the instant plea arrangement, petitioner merely bargained for the State's recommendation and was advised as follows: "Do you understand that is a recommendation only and I don't have to follow that?" , to which petitioner responded "Yes sir." (R 3). Clearly, Petitioner received what he bargained for: a reduced sentence recommendation conveyed to the judge by the prosecutor. Accordingly, the affirmance of the trial court's denial of the plea withdrawal motion was proper.

CONCLUSION

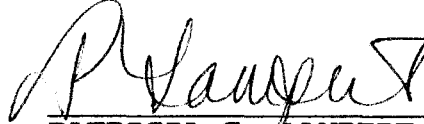
Based on the foregoing, Respondent respectfully requests that this Honorable Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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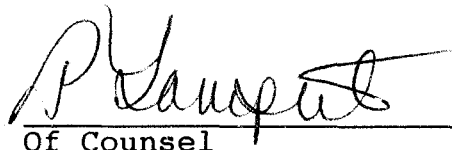


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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been forwarded by courier to: SUSAN D. CLINE, Assistant Public Defender, 301 N. Olive Avenue, The Governmental Center/9th Floor, West Palm Beach, Florida 33401, this 21st day of May, 1991.


Of Counsel

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