

IN THE
SUPREME COURT OF FLORIDA

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MILTON THOMAS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 76,825

PETITIONER'S BRIEF ON JURISDICTION

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ARGUMENT

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida. The Respondent was the Appellee and the Prosecution, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

A = Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner entered a nolo contendere plea to the offense of battery on a law enforcement officer in the Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County. He was sentenced to three years incarceration to be followed by two years probation.

Petitioner had entered into a written plea agreement which contemplated a four-month sentence with credit for time served to be followed by probation. The trial court accepted Petitioner's nolo contendere plea and ordered a presentence investigation. The Department of Corrections' report recommended three years in prison, with restitution to be ordered if the sentence included probation or work release. Although Petitioner moved to withdraw his nolo contendere plea after the DOC recommendation was conveyed to the trial court, the trial court denied the motion. The state, "albeit reluctantly, reaffirmed its recommendation pursuant to the plea agreement" (A 1). However, the state announced it would not agree to the trial court using its recommendation of four months incarceration as a written reason to depart from the guidelines (A 1).

Petitioner appealed from the judgment and sentence and denial of his motion to withdraw his plea. His conviction and the trial court's denial of his motion to withdraw his plea of nolo contendere were affirmed by the Fourth District Court of Appeal on July 25, 1990. On August 9, 1990, Petitioner timely requested rehearing (A 2-4). The district court denied rehearing but withdrew its earlier opinion and substituted the opinion filed September 19,

1990 (A 1).

The district court held that the state did not breach its plea agreement to recommend a sentence of four months incarceration (with credit for time served to be followed by probation) despite the fact that the DOC presentence investigation recommended three years incarceration and that the state "albeit reluctantly" reaffirmed its recommendation. The district court also determined that the state did not breach its plea agreement by announcing that it would not agree to the trial court using its recommendation of four months incarceration as a written reason to depart from the guidelines. The district court rejected Petitioner's alternative argument that if the trial court accepts a plea and then does not impose a sentence in accordance with the plea agreement, it must offer the defendant an opportunity to withdraw his plea and proceed to trial. The district court determined that Petitioner bargained for the state's recommendation of a four-month sentence, that the trial court was not bound by the state's recommendation and that Petitioner was not deprived of the benefit of his bargain (A 1).

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction on October 19, 1990. This brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

The Fourth District's decision is in conflict with Lee v. State concerning whether the state's plea agreement is breached and a defendant is denied the benefit of his bargain when a representative or agent of the state communicates a contrary sentencing recommendation to a trial court. Further, the holding is in conflict with Goldberg v. State and State v. Newsome as the district court has determined that the trial court did not err in denying Petitioner's motion to withdraw his nolo contendere plea when the trial court found it could not impose a sentence in accordance with the plea agreement it had previously accepted.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THOMAS V. STATE DIRECTLY AND EXPRESSLY CONFLICTS WITH LEE V. STATE, GOLDBERG V. STATE, AND STATE V. NEWSOME.

The decision of the district court of appeal is in express and direct conflict with Lee v. State, 501 So.2d 591 (Fla. 1987), on one point of law, and in express and direct conflict on another point of law with Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988), and State v. Newsome, 549 So.2d 818 (Fla. 2d DCA 1989). Accordingly, this Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

In Lee v. State, this Court held that a sentencing recommendation by any representative or agent of state government which is contrary to the state's plea bargain agreement constitutes a breach of the agreement if the inconsistent recommendation is communicated to the trial court in any manner, whether in a presentence investigation report or in open court:

In his dissent in the case sub judice Judge Ervin takes the position that 'a breach [of the plea agreement] occurs if any representative of the government fails to honor a plea bargain agreement entered into between the state and the defense, particularly if it influences a consequence not contemplated by the agreement.' 490 So.2d at 84, (Ervin, J., concurring in part and dissenting in part). Under Florida Rule of Criminal Procedure 3.171, the prosecuting attorney represents the state in all plea negotiations. We agree with Judge Ervin, that once a plea bargain based on a prosecutor's promise that the state will recommend a certain sentence is struck, basic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state's recommendation.

We also agree with the Fortini¹ court that it matters not whether the recommendation contrary to the agreement is made in open court or whether, as here, it is contained in a PSI report. 'The crucial factor is that a recommendation contrary to the state's agreement came to the sentencing court's attention.' 472 So.2d at 1385. Regardless of how a recommendation counter to that bargained for is communicated to the trial court, once the court is apprised of this inconsistent position, the persuasive effect of the bargained for recommendation is lost.

501 So.2d at 593 (emphasis supplied).

Sub judice, the district court of appeal found that because the state, "albeit reluctantly, reaffirmed its recommendation" of four months incarceration pursuant to the plea agreement after a Department of Corrections presentence investigation (PSI) report recommended three years incarceration to the court, that the Petitioner got the benefit of his bargain. The district court therefore determined that the trial court did not err in denying Petitioner's motion to withdraw his plea which was made before sentencing. The district court did so despite the state's announcement to the trial court that it would not agree to the trial court using its recommendation of four months incarceration as a written reason to depart from the guidelines. 15 F.L.W. D2350. Lee v. State dictates a contrary finding; that by the DOC probation officer making an inconsistent sentencing recommendation to the court in its PSI, the state had breached the plea agreement and the Petitioner lost the persuasiveness of the bargained for recommendation. Thus, the district court has created express and

¹ Fortini v. State, 472 So.2d 1383 (Fla. 4th DCA 1985).

direct conflict with this Court's decision in Lee v. State.

In addition, the district court's decision is in express and direct conflict with Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988), and State v. Newsome, 549 So.2d 818 (Fla. 2d DCA 1989), on a related point of law. At bar, the district court found that the trial court did not err by failing to offer Petitioner an opportunity to withdraw his plea when the court did not impose a sentence in accordance with the plea agreement or by denying Petitioner's motion to withdraw his nolo contendere plea. 15 F.L.W. D2350. This holding is in express and direct conflict with the aforementioned decisions of another district court to the effect that before being sentenced a defendant should be given an opportunity to withdraw his plea if a trial court is unwilling to impose a sentence in accordance with the plea agreement.

In Goldberg v. State, 536 So.2d 364, the second district court of appeal held that when a negotiated plea agreement could not be honored the defendant should have been allowed to withdraw his plea and the trial court had an affirmative duty to so advise the defendant. In Goldberg, all parties anticipated a guidelines sentence of probation based on the defendant's representation that he had no prior record. When the PSI revealed an extensive prior record, the court refused to honor the plea agreement and sentenced the defendant to guidelines sentence of five years on each count. Id. at 365.

In State v. Newsome, 549 So.2d 818, the district court held that if a trial court finds that it cannot accept the plea

agreement as presented to the court, it must allow the defendant to withdraw his plea and return to the position he was in prior to tendering his plea.

Thus, the instant decision of the fourth district court of appeal is in express and direct conflict with Lee v. State, 501 So.2d 591 (Fla. 1987), Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988), and State v. Newsome, 549 So.2d 818 (Fla. 2d DCA 1989). This Court should exercise its discretionary review jurisdiction and resolve the conflicts presented between the district courts and between the district court and this Court on these frequently recurring issues.

CONCLUSION

Whereas, Petitioner prays this Honorable Court will exercise its discretion to review the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Patricia G. Lampert, Assistant Attorney General and Michael H. Greenfield, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 29th day of October, 1990.



Of Counsel