CASE NO: SC19-1622

In the Supreme Court of Florida

JUAN C. CASIANO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL
DCA Nos.: 4D18-3255 & 4D18-3257

PETITIONER'S REPLY BRIEF ON THE MERITS

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A DIRECT APPEAL CHALLENGING AN IMPROPER PRISON SANCTION IMPOSED PURSUANT TO SECTION 775.082(10), FLORIDA STATUTES, IS NOT RENDERED MOOT BY A DEFENDANT'S RELEASE FROM PRISON

This Court's Disposition of Booker v. State *Lacks Precedential Value*

In its Answer Brief, the State asserts "that the Fourth District [Court of Appeal's] decision [in Petitioner's case] is proper and consistent with this Court's recent disposition of a mootness issue raised in *Booker v. State*, No. SC18-752, 2019 WL 1434049 (Fla. Apr. 1, 2019)." (AB. 4). This argument overlooks, however, that this Court's unpublished dismissal order in *Booker* lacks precedential value. *See Pedroza v. State*, 291 So. 3d 541, 546 n.2 (Fla. 2020) (explaining that "unpublished orders lack precedential value").

The circumstances surrounding the dismissal of *Booker* differ greatly from the present. This Court accepted jurisdiction in *Booker* to decide what remedy to apply when a trial court improperly imposes a prison sanction pursuant to section 775.082(10), Florida Statutes. *See* Docket for *Booker v. State*, No. SC18-752. After merits briefing but before oral arguments, the defendant notified this Court of his release from prison but asserted this Court should retain jurisdiction because the question raised on appeal was of great public importance and likely to recur. The

State moved to dismiss the appeal as moot. Neither party cited to or discussed *Johnson v. State*, 260 So. 3d 502 (Fla. 1st DCA 2018), in their pleadings.[1]

This Court reserved ruling on the State's motion to dismiss and the case proceeded to oral arguments. Shortly after oral arguments, this Court *sua sponte* entered an order that consolidated *Booker* with another pending case—*Gaymon v. State*, SC19-712—and permitted the parties to file notices in *Gaymon* adopting the merits briefs filed in *Booker*. Without addressing the issue of mootness, both parties filed notices adopting their briefs. Months later, this Court entered an order dismissing the notice to invoke jurisdiction in *Booker*.

As the above demonstrates, the issue of mootness was not thoroughly briefed by the parties in *Booker* nor addressed by the lower court's decision. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). "The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not

[1] The Fourth District Court of Appeal issued its opinion in the instant case on September 18, 2019, two days after the oral arguments in *Booker* were conducted.

inadvertently passed over." *Penson v. Ohio*, 488 U.S. 75, 85 (1988).

The necessity of full briefing was recently recognized by three members of this Court in *Colon v. State*, 44 Fla. L. Weekly S251 (Fla. Nov. 19, 2019). There, Chief Justice Canady—in a concurring opinion joined by Justices Polston and Lawson—"point[ed] out that the Court ha[d] never considered on the basis of full briefing by the parties the issue of remedy addressed in *Williams v. State*, 242 So. 3d 280 (Fla. 2018)." *Id.* Accordingly, Chief Justice Canady wrote that "that issue will be ripe for reconsideration when it is properly presented to the Court." *Id.*

Unlike in *Booker*, the parties to the instant case have been provided the opportunity for full briefing on the issue of mootness, which was framed by conflicting district court of appeal opinions below. Given this difference in posture, the dismissal order in *Booker* should not influence this Court's disposition of Petitioner's appeal—particularly where the unpublished dismissal order in *Booker* lacks precedential value. *See Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 133 (Fla. 2d DCA 2015) (noting that the court's "unpublished dispositions," though discoverable online, have "no precedential value").

Resentencing Proceedings Would Affect Petitioner's Liability for Costs Incarceration and His Potential Status as a Prison Releasee Reoffender

As to the merits, the State argues this case is moot because reversal for resentencing would not alter (1) Petitioner's liability for costs of incarceration and correction costs or (2) Petitioner's qualification for enhanced sentencing. (AB. 7).

According to the State's argument, "Petitioner has completed his sentence in a Florida State correctional facility pursuant to a negotiated plea agreement; the costs incurred from that prison sentence and the fact that he has been release[d] from a state correctional institution cannot be undone." (AB. 7). Petitioner disagrees.

Should this case be reversed, Petitioner's prior sentence would be vacated and the case remanded for a de novo resentencing. *See State v. Collins*, 985 So. 2d 985, 988-89 (Fla. 2008) (explaining that resentencing is a de novo proceeding). The resentencing proceedings would be a "clean slate," *Preston v. State*, 607 So. 2d 404, 408 (Fla. 1992), meaning that Petitioner's vacated sentence becomes a "nullity" and his "resentencing should proceed de novo on all issues bearing on the proper sentence." *Morton v. State*, 789 So. 2d 324, 334 (Fla. 2001) (quoting *Teffeteller v. State*, 495 So.2d 744, 745 (Fla. 1986)); *see also Dean v. State*, 45 Fla. L. Weekly D809 (Fla. 4th DCA Apr. 8, 2020).

During the resentencing, the trial court would have to impose a non-state prison sanction unless the State impaneled a jury to make the finding that Petitioner presents a danger to the public. *See Gaymon v. State*, 288 So. 3d 1087, 1092 (Fla. 2020) (holding that "remanding for a jury to make the dangerousness finding under subsection (10) best protects the due process rights of defendants while complying with the de novo nature of resentencing proceedings").

If the trial court imposes a non-state prison sanction, Petitioner's commitment to, and release from, the county jail would not qualify him in the future for prison releassee reoffender enhancements. *See Delon v. State*, 268 So. 3d 945, 946 (Fla. 1st DCA 2019) (a defendant who "was sentenced to jail and released from jail . . . clearly would not qualify under the PRR statute"). Furthermore, a reduction in Petitioner's incarceration would reduce his potential liability for costs of incarceration, because such costs are determined based on the length of the sentence imposed rather than the amount of incarceration actually served. *See Miami Dade County v. Moss*, 842 So. 2d 284, 285 (Fla. 3d DCA 2003).

The flaw in the State's reasoning is that it fails to appreciate that a defendant's vacated sentence is a nullity. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a "nullity" as "[s]omething that is legally void"). Regardless of whether Petitioner previously went to prison, Petitioner's prior sentence would be void and his potential PRR status would be controlled by the subsequent sentence imposed at the resentencing. Taken to its logical end, the State's erroneous analysis would mean that a defendant would be eligible for PRR enhancements even if a defendant's case was remanded for entry of a judgment of acquittal after the defendant finished serving a prison sentence—that is because, technically, the defendant completed his sentence and was "release[d] from a state correctional institution." Such an unjust result is contrary to the PRR statute's text and intent.

Petitioner's Open Plea With a Cap Does Not Bar Relief

In addition, the State contends in its Answer Brief that "[b]ecause this case involved a negotiated plea, the potential collateral consequences Petitioner raises . . . of him possibly getting a reduced probationary sentence . . . is only a possibility of he moves to withdraw his plea." (AB. 8). Preliminarily, this Court need not reach this argument because it goes beyond the conflict issue of mootness and delves into the substantive matter of whether Petitioner is entitled to relief. Nevertheless, Petitioner believes that the State's argument cuts too broadly with regards to the nature of the plea Petitioner entered below.

In most circumstances, a negotiated plea refers to an agreed upon "exchange for specific sentences." *Hawkins v. State*, 138 So. 3d 1196, 1199 (Fla. 2d DCA 2014), *cause dismissed,* 145 So. 3d 824 (Fla. 2014). By contrast, an open plea with a cap on the maximum sentence can be "effectively a general open plea." *Odom v. State*, 194 So. 3d 565, 567 (Fla. 1st DCA 2016) (holding that a negotiated plea "conditioned on a sentencing cap of fifteen years in prison" was "effectively a general open plea" for double jeopardy purposes where the defendant could not lawfully be sentenced to greater than fifteen years had he entered an open plea); *Goldstein v. State*, 154 So. 3d 469, 470 (Fla. 2d DCA 2015) (referring to "an open plea that would cap his sentence at ten years and that allowed for an unlimited amount of supervision"); *Wright v. State*, 268 So. 3d 208, 211 (Fla. 2d DCA 2019)

(concluding plea was open even though the State dropped a charge when the defendant entered his plea).

The State's argument derives from the general principal that "[w]hen a sentence has been reduced in contravention of a plea bargain, the state should be given the option of either agreeing that both the judgment and the sentence should be vacated and taking the defendant to trial on all original charges, or agreeing that only the excessive sentence should be vacated." *Cheney v. State*, 640 So. 2d 103, 105 (Fla. 4th DCA 1994). As the Fifth District explained in a case where the trial court imposed a mandatory minimum pursuant to a negotiated plea but the mandatory minimum should not legally have applied:

> If the foundation of the sentence is defective, a new sentence cannot correct it. Only a new plea negotiation or a trial can remedy the problem at this point. To let the plea and judgment stand would give the defendant the benefits of his bargain-i.e., a three-year sentence cap and dismissal of the other charge-and would deny the state what it bargained for: a mandatory three-year sentence.
>
> The state's negotiation was clearly based upon the premise that the defendant would receive a mandatory three-year sentence. If the plea negotiation is not binding upon the defendant, then it is not binding upon the state. The nolle prosequi, entered before jeopardy attached on the charge for shooting into a dwelling, should not operate as an acquittal nor prevent further prosecution if the negotiated plea is not binding. *See Bucolo v. Adkins*, 424 U.S. 641 (1976).

Jolly v. State, 392 So. 2d 54, 56 (Fla. 5th DCA 1981).

An illustration of this principle arose in *Parks v. State*, 223 So. 3d 380 (Fla. 2d DCA 2017) (en banc), where the defendant entered a negotiated plea to three

lesser offenses of attempted second-degree murder with a firearm—which are first-degree felonies—in exchange for concurrent sentences of fifteen years' imprisonment followed by lifetime probation. In a postconviction motion, the defendant correctly argued that lifetime probation was illegal because he had only been convicted of first-degree felonies punishable by thirty years. However, the Second District Court of Appeal held the defendant would only be entitled to be resentenced within the statutory maximum **if** the State agreed to the resentencing. *Id.* at 383. That was because resentencing the defendant would contravene the terms of sentence the State had agreed to during its negotiations. *Id.; see also Kelly v. State*, 957 So. 2d 108 (Fla. 4th DCA 2007) (where defendant's ten-year sentence under negotiated plea exceeded the statutory maximum).

In this case, the State has not lost the benefit of its bargain because Petitioner pled to all counts as charged and the parties never agreed upon a specific sentence. The only arrangement between the parties was—as the trial court described it—"an open plea with caps kind of." (T1. 3). The State's negotiation would only have been impacted if the trial court contemplated imposing a sentence of incarceration in excess of eighteen months, which it did not.

Most importantly, the limited agreement between the parties contemplated that the State would have to prove to a fact-finder—over Petitioner's argument to the contrary—that Petitioner was a danger to the public. Pursuant to this Court's

decision in *Gaymon*, the State is not precluded from empaneling a jury to make a dangerousness finding. The only difference during a resentencing would be that the fact-finder is a jury, rather than the trial judge. The State has not lost the benefit of its limited bargain, as it can still prove to a fact-finder that Petitioner is a danger to the community and secure a prison sentence. Therefore, the proper remedy is to reverse and remand for a de novo resentencing.

CONCLUSION

The trial court violated the Sixth Amendment by finding that Petitioner posed a "danger to the public" and imposing a prison sanction. Because multiple adverse collateral legal consequences flow from the trial court's erroneous imposition of a prison sanction, the Fourth District Court of Appeal should not have dismissed Petitioner's appeal as moot. For the above reasons, Petitioner respectfully requests that this Court disapprove of the Fourth District's decision below and approve *Johnson v. State*, 260 So. 3d 502 (Fla. 1st DCA 2018).

CERTIFICATE OF SERVICE

I certify that this brief was filed with the Court and a copy of it was served to Rachael Kaiman, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 3rd day of June, 2020.

/s/ BENJAMIN EISENBERG
BENJAMIN EISENBERG

CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ BENJAMIN EISENBERG
BENJAMIN EISENBERG