DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2008

JEFFREY POMASKI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D07-3017

[June 18, 2008]

MAY, J.

The defendant appeals his sentence following a negotiated plea to a violation of probation. He argues the trial court erred in adjudicating and sentencing him on both grand theft and dealing in stolen property charges that arose from one scheme or course of conduct.[1] We affirm, but write to explain why this well-known statutory prohibition does not result in a reversal.

The State charged the defendant with grand theft and dealing in stolen property for the theft of aluminum ramps and hand rails from school portables, which he sold to a scrap yard. At the change of plea hearing, defense counsel explained that they had agreed to a negotiated plea, but the State had since added a new condition: preventing the defendant from having contact with his ex-wife. The State confirmed that it sought the additional condition, explaining that the ex-wife had been the one to report the crime to law enforcement. The State explained that the condition was a "deal-breaker" and suggested that the defendant plead open to the court in lieu of a negotiated plea.

After defense counsel discussed the options with the defendant, he entered an open plea. The court explained to the defendant that he was entering a plea of no contest to both grand theft and dealing in stolen property charges. Reiterating that there was no plea agreement, the court explained that it could sentence the defendant to the maximum

[1] Unrelated to the case involved in this appeal, the defendant was also charged and simultaneously pled to another grand theft charge.

punishments for both crimes and run the sentences consecutively. The defendant then signed a plea form and entered an open plea; the State provided the requisite factual basis. The court found the defendant guilty of grand theft and dealing in stolen property, but withheld adjudication and sentenced him to four years probation. The defendant did not appeal this sentence.

Approximately two months later, the defendant tested positive for cocaine, prompting a violation of probation affidavit to be filed. At the violation hearing, the defendant informed the trial court that he wanted to resolve the violation by way of a negotiated plea. The trial court explained to the defendant that it would adjudicate him guilty of the charges.

Defense counsel stipulated that the violation of probation affidavit stated a factual basis for the plea. The defendant signed a written plea form admitting the violation of probation and indicating his understanding that the violation was for both grand theft and dealing in stolen property charges. The court accepted the plea, adjudicated the defendant guilty, revoked his probation, and sentenced him to 180 days in jail.[2]

On appeal, the defendant now argues that the trial court erred in adjudicating him guilty of both grand theft and dealing in stolen property charges in connection with one scheme or course of conduct. § 812.025, Fla. Stat. (2006). While this argument would ordinarily be successful, the statutory prohibition against adjudicating a defendant guilty of both crimes based upon one scheme or course of conduct does not apply when the defendant enters into a negotiated plea with the State. The right to contest a sentence on grounds that it violates section 812.025 may "be waived, and a waiver will generally be found following a guilty or no contest plea entered as part of a bargain with the state." *Kilmartin v. State*, 848 So. 2d 1222, 1224 (Fla. 1st DCA 2003) (citing *Novaton v. State*, 634 So. 2d 607, 609 (Fla. 1994)).

Here, while the plea to the underlying charge was an open plea, the defendant did not appeal from that sentence. The sentence currently

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[2] The defendant filed a motion to withdraw his plea, which was not heard until after the defendant violated his probation. At the violation hearing, the court reiterated that the defendant's plea to the original charges had been "straight up" to the court, "not something negotiated between [him] and the State." The trial court denied the motion to withdraw plea. This court has previously affirmed that order.

being appealed is from the negotiated plea entered into by the defendant for the violation of probation. Therefore it falls within the exception to the general prohibition found in section 812.025, Florida Statutes.

Affirmed.

STEVENSON and GROSS , JJ., concur.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Burton C. Conner, Judge; L.T. Case No. 562006CF003080A.

Carey Haughwout, Public Defender, and Christine C. Geraghty, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Melanie Dale Surber, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing