IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DANNIE STANFORD HOLDEN, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-1828

Opinion filed June 14, 2012.

An appeal from the Circuit Court for Alachua County.
James P. Nilon, Judge.

Dannie Stanford Holden, Jr., pro se, Appellant.

Nancy A. Daniels, Public Defender, Glenna Joyce Reeves and Steven L. Seliger, Assistant Public Defenders, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, for Appellee.

THOMAS, J.

In this Anders[1] appeal, Appellant entered a plea of nolo contendere to the lesser included charge of attempted sexual battery and resisting an officer without

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[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493

violence. Appellant sought to preserve for appeal the review of the trial court's denial of his motion to suppress his confession and the trial court's determination on the admissibility of the child victim's out-of-court statements to a Child Protective Team ("CPT") forensic interviewer and the doctor who performed the forensic medical evaluation.

Having pled nolo contendere, Appellant is limited as to the issues that he can raise on direct appeal. Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979). A defendant who pleads nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal. Fla. R. App. P. 9.140(b)(2)(A)(i). A trial court is obligated to determine the dispositive nature of an issue reserved for appeal. See Everett v. State, 535 So. 2d 667 (Fla. 2d DCA 1988). Here, the State did not stipulate, and the trial judge erroneously declined to determine that these issues are dispositive, deferring the determination to this court.

We have reviewed the entire record before us and conclude that the two issues reserved for appeal are not dispositive. As to the first issue, Appellant's confession, we note that a defendant who has pled no contest may not preserve as an issue the trial court's failure to suppress a confession, absent a stipulation by the State that the issue is dispositive of the case. Brown v. State, 376 So. 2d 382, 385 (Fla. 1979); Leisure v. State, 429 So. 2d 434 (Fla. 1st DCA 1983). Here the State

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(1967).

at sentencing commented that it did not care if Appellant appealed, concurring with the trial court's statement that it was not sure that the issue was dispositive and noting that Appellant could "reserve his rights to appeal whatever matters the law allows him to appeal." We do not consider this a stipulation. Because the State did not stipulate that Appellant's confession was dispositive, we need not reach the merits of this issue.

As to the second issue, the admissibility of child hearsay statements, we find that the record on appeal contains overwhelming evidence that the State could have proceeded to trial, regardless of whether Appellant successfully argued on appeal that the child hearsay statements were inadmissible. See Williams v. State, 37 Fla. L. Weekly D800 (Fla. 1st DCA April 4, 2012) ("An issue is dispositive only when it is clear that there will be no trial, regardless of the outcome of the appeal.") Here, there was testimony from the child victim and an eyewitness who walked in and saw Appellant and the child victim engaged in sexual conduct. Accordingly, we affirm Appellant's judgment and sentence.

AFFIRMED.

BENTON, C.J., CONCURS IN THE JUDGMENT WITH OPINION; SWANSON, J., DISSENTS WITH OPINION.

BENTON, C.J., concurring in the judgment.

It is important that the defendant understand what the consequences of his or her plea are, including what can and cannot be reviewed on direct appeal, at the time the plea is entered. As we recently explained in Williams v. State, 37 Fla. L. Weekly D800 (Fla. 1st DCA Apr. 4, 2012), following supreme court precedent on the point, see Brown v. State, 376 So. 2d 382, 384 (Fla. 1979) and State v. Ashby, 245 So. 2d 225, 228 (Fla. 1971):

> A defendant who pleads no contest may expressly reserve the right to appeal a prior dispositive order of the lower tribunal. Fla. R. App. P. 9.140(b)(2)(A)(i). An issue is dispositive only when it is clear that there will be no trial, regardless of the outcome of the appeal. Fuller v. State, 748 So. 2d 292, 294 (Fla. 4th DCA 1999).

Williams, 37 Fla. L. Weekly at D800. See also Morgan v. State, 486 So. 2d 1356, 1357 (Fla. 1st DCA 1986) ("[W]e cannot reach that issue because the trial court's rulings are not dispositive."). Whether a ruling is dispositive is a question for the trial court, and not for us, in the first instance, because it is imperative that the defendant's plea be voluntary and intelligent.

Here, as in Williams, "the record is not inconsistent with the view that appellant's plea was induced by assurances that [certain] issues would be addressed on direct appeal." 37 Fla. L. Weekly at D801. (Benton, C.J., concurring). Here, as in Williams, however, no relief is available on the present appeal from a conviction predicated on a plea that was not intelligent, in the

absence of a motion to withdraw the plea in the trial court. See Leonard v. State, 760 So. 2d 114, 119 (Fla. 2000) ("A summary disposition . . . will advance the interests of judicial economy and fulfill the purposes of the Criminal Appeals Reform Act by efficiently disposing of appeals where the defendant pleaded . . . nolo contendere and the appeal . . . does not present . . . a legally dispositive issue that was expressly reserved for appellate review pursuant to section 924.051(4)."). Possibly without counsel, appellant is left to avail himself of "Florida Rule of Criminal Procedure 3.850 [which] contemplates collateral relief from convictions predicated on pleas that are not voluntary and intelligent. Fla. R. Crim. P. 3.850(a)(1) and (5)." Williams, 37 Fla. L. Weekly at D801 (Benton, C.J., concurring).

SWANSON, J., dissenting.

I respectfully dissent.

In this case, Appellant entered a plea of no contest and sought to preserve for appeal his motion to suppress a purported confession as well as the trial court's ruling on the admissibility of child hearsay. When a trial court receives a plea pursuant to Florida Rule of Criminal Procedure 3.172, and the defendant seeks to reserve a question of law for appeal, it is well settled that the trial court is obligated to determine the dispositive nature of the question or questions. Everett v. State, 535 So.2d 667 (Fla. 2d DCA 1988). The majority has concluded, in essence, as a matter of judicial economy and based upon review of the entire record, to affirm. There is authority for such action. Rust v. State, 742 So.2d 471 (Fla. 2d DCA 1999).

Nonetheless, without a ruling from the trial court as to whether the above two issues were dispositive, I am of the opinion this case should be remanded to the trial court for appropriate findings.

As discussed in Judge Benton's concurring opinion, one could reasonably conclude Appellant's plea was induced by a belief that the trial court rulings on the confession and child hearsay issues would be addressed on appeal. Remand, as contemplated by this dissent, would result in further proceedings where the defendant had the benefit of counsel. At that point, the defendant would at least

have the opportunity to further consider, with the benefit of counsel, whether to file a motion for relief from judgment. Fla. R. Crim. P. 3.850(A)(5). Given the totality of this record, I conclude the Appellant should be given that opportunity.