FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3617

KATHGRET R. RENTZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Robert R. Wheeler, Judge.

December 5, 2019

B.L. THOMAS, J.

Appellant challenges the trial court's denial of her motion to withdraw her plea, denial of her motion to suppress, and the reliance on impermissible sentencing factors. We reverse the trial court's denial of Appellant's motion to withdraw her plea and decline to address the other arguments on appeal.

Facts

The State charged Appellant with six counts of lewd and lascivious conduct in violation of section 800.04(6)(b), Florida Statutes. All charges were enhanced to first-degree felonies based on Appellant's status as an authority figure at the victim's school, pursuant to section 775.0862, Florida Statutes.

Officer Brannon of the Tallahassee Police Department (TPD) responded to a report of inappropriate behavior between an adult female and a male child. The complainant informed dispatch that the subjects were kissing and acting inappropriately with one another in the pool area of an apartment complex. When Officer Brannon arrived on scene, he met with a leasing manager who reported that several employees and tenants informed her of inappropriate behavior between an adult female and a male child over the past week. The leasing manager pointed out the suspect and the victim, who were still in the pool.

Officer Brannon observed the two from the leasing office while they interacted together in the pool. Although Officer Brannon did not see the two touch or kiss, he noted that the way they behaved was "very unusual" and at one point, the child went under water while the suspect "slowly swam directly over him in a seductive manner."

A short time later, the adult female and male child left the pool and entered the female's vehicle. Officer Brannon approached the vehicle and conducted an investigatory stop. The two were walked to the leasing office and separated. The suspect was identified as Appellant Kathgret Rentz, a twenty-eight-year-old female, and the child was identified as an eleven-year-old male. Appellant informed Officer Brannon that she was close family friends with the child. Officer Brannon read Appellant her *Miranda* warnings, and she advised him that she wanted an attorney.

The police took statements from seven independent witnesses who observed inappropriate conduct at the pool between Appellant and the victim. According to the witness statements, the suspect and the victim had been seen kissing and hugging as though they were a couple on various occasions in the previous two weeks. One witness reported seeing the victim grabbing the suspect's breasts in addition to observing them hugging and kissing intimately. A separate witness reported seeing the two "caressing, kissing, and fondling each other in inappropriate places." The consistent theme throughout the accounts was that the two appeared to be a couple that were involved in a romantic relationship.

The victim's mother arrived on scene, confirmed the victim's age, and informed the police that Appellant was the guidance counselor at the victim's school. Appellant befriended the victim's family and offered to help the victim with his school work and other issues. According to the victim's mother, the victim spent the night at Appellant's residence more than once and "communicated with [Appellant] via cellular phone on a regular basis."

Appellant was arrested for lewd or lascivious conduct. It was noted that the investigation would be ongoing with pending search warrants. The police obtained nine search warrants, one of which was for Appellant's vehicle and two of which were for Appellant's cell phone.

Appellant filed a motion to suppress the evidence police obtained during execution of all nine search warrants. The trial court denied the motion. After the trial court denied Appellant's motion, the State filed a second amended information, and Appellant pleaded no contest to six counts of lewd and lascivious conduct. As part of her plea, Appellant reserved her right to appeal the denial of her motion to suppress. During the change of plea, the trial court found that the motion to suppress was dispositive. The State was silent as to the trial court's finding that the motion to suppress was dispositive, but it did not object and agreed to the recommended sentencing range of 8-25 years in state prison.

Prior to sentencing, defense counsel withdrew from defending Appellant. Successor counsel asked the State whether it would stipulate that the suppression issues were dispositive of Appellant's case. The State refused to do so.* Successor counsel then filed a motion to withdraw Appellant's plea under rule 3.170, Florida Rules of Criminal Procedure. Counsel pointed out that Appellant pleaded with the assurance from the trial court that her motion to suppress was dispositive; he argued Appellant did not agree to plea and take an appeal that would later be dismissed. Without comment or a hearing, the trial court summarily denied Appellant's motion to withdraw her plea the following day.

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*These contentions were presented by counsel in the written motion to withdraw the plea.

At Appellant's sentencing hearing, the State presented evidence supporting a relationship between Appellant and the victim. The trial court sentenced Appellant to twenty years of imprisonment followed by ten years of sex-offender probation.

Analysis

Appellant argues that the trial court erred in denying her motion to withdraw her plea. "The standard of review for a trial court's denial of a motion to withdraw a plea is abuse of discretion." *Wallace v. State*, 939 So. 2d 1123, 1124 (Fla. 3d DCA 2006). The burden is on Appellant to show that the trial court abused its discretion. *Robinson v. State*, 761 So. 2d 269, 274 (Fla. 1999).

Rule 3.170(f), Florida Rules of Criminal Procedure, provides that "[t]he court may in its discretion, and shall on good cause, at any time before a sentence, permit a plea of guilty or no contest to be withdrawn." The burden to establish good cause rests on the party seeking to withdraw the plea. *Wagner v. State*, 895 So. 2d 453, 455-56 (Fla. 5th DCA 2005). A defendant should be permitted to withdraw a plea where the plea was entered under "mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting her rights." *Robinson*, 761 So. 2d at 274 (quoting *Yesnes v. State*, 440 So. 2d 628 (Fla. 1st DCA 1983)). Mere allegations are not enough; the defendant must offer proof that the plea was not entered voluntarily and intelligently. *Robinson*, 761 So. 2d at 274.

Appellant claims that her plea was made with the mistaken belief that she would be able to appeal the order denying her motion to suppress based on the ruling by the trial court that the motion was dispositive. Thus, to determine whether Appellant should have been permitted to withdraw her plea, it must be determined whether Appellant could appeal the order denying her motion to suppress at the time she entered her plea.

"A defendant who enters a plea of guilty or nolo contendere has no right to appeal unless the defendant expressly reserves the right to appeal a dispositive order." *Milliron v. State*, 274 So. 3d 1173, 1174 (Fla. 1st DCA 2019); *see also* Fla. R. App. P. 9.140(b)(2)(A)(i). A determination by the trial court that an issue

is dispositive will also preserve an issue for appellate review; however, it is subject to an abuse of discretion standard on review. *Vaughn v. State*, 711 So. 2d 64, 66 (Fla. 1st DCA 1998). Thus, an appellate court can overturn a trial judge's decision that an issue is dispositive if that decision is "arbitrary, fanciful, or unreasonable." *Johnson v. State*, 40 So. 3d 883, 886 (Fla. 4th DCA 2010).

The trial court abused its discretion in determining that Appellant's motion to suppress was dispositive. An issue is dispositive when it is clear that there will be no trial, regardless of the outcome on appeal. *Hicks v. State*, 277 So. 3d 153, 155 (Fla. 1st DCA 2019); *Williams v. State*, 134 So. 3d 975, 976 (Fla. 1st DCA 2012). Based on the record, the State could have proceeded to trial without the evidence obtained from the search warrants of Appellant's vehicle and phone.

The State had seven witnesses who observed Appellant and the victim engaging in inappropriate conduct. Additionally, the State had evidence from the search of Appellant's apartment. This was enough additional evidence that the State could have proceeded to trial without the evidence from Appellant's vehicle and phone. *See Vaughn*, 711 So. 2d at 66 (finding that a motion to suppress was not dispositive when there was additional evidence the State could have used to take the case to trial without the evidence from the wiretap); *Campbell v. State*, 386 So. 2d 629, 629 (Fla. 5th DCA 1980) (a motion to suppress was not dispositive where the State had other evidence and eyewitness testimony with which it could have tried the defendant).

The trial court's determination that Appellant's motion to suppress was dispositive did not preserve the merits of the motion for appellate review. *See Vaughn*, 711 So. 2d at 66. Because we hold that the motion to suppress was not dispositive, it is not appealable. *See Hicks*, 277 So. 3d at 155. Thus, in finding the motion to suppress dispositive, the trial court mistakenly informed Appellant that the motion was appealable. It was based on this mistaken belief that Appellant accepted the State's plea agreement.

Appellant's motion to withdraw her plea contained proof that Appellant entered her plea under the mistaken belief that her motion to suppress was appealable. This was enough to show that her plea was not voluntarily and intelligently entered. As a result, Appellant showed good cause that she should have been permitted to withdraw her plea and the trial court erred in failing to let her do so.

If the State had stipulated to the trial court's finding of dispositiveness, then Appellant's motion to suppress would have been appealable. *See Churchill v. State*, 219 So. 3d 14, 18 (Fla. 2017). "[I]n appeals from conditional no contest pleas, stipulations of dispositiveness are binding on the appellate court." *Id.*

The State did not stipulate to the trial court's finding that Appellant's motion to suppress was dispositive. "A plea agreement is a contract and the rules of contract law are applicable to plea agreements." *Garcia v. State*, 722 So. 2d 905, 907 (Fla. 3d DCA 1998); *see also Cox v. State*, 35 So. 3d 47, 48 (Fla. 1st DCA 2010) (disapproved of on other grounds). For the State to have stipulated to the trial court's finding, it must have entered into a valid contract with Appellant via the plea agreement. A valid contract arises when the parties' assent is manifested through written or spoken words, or "inferred in whole or in part from the parties' conduct." *L & H Constr. Co., Inc. v. Circle Redmont, Inc.*, 55 So. 3d 630, 634 (Fla. 5th DCA 2011) (assent inferred where L & H paid the initial deposit and two subsequent payments despite not signing the final proposal); *Gateway Cable T.V., Inc. v. Vikoa Constr. Corp.*, 253 So. 2d 461, 463 (Fla. 1st DCA 1971).

The State failed to take any actions that would support a finding that it agreed that the motion to suppress was dispositive. Although the State did not object to the trial court's finding of dispositiveness and agreed to the sentencing range, it never expressly stated that it agreed with the trial court's finding that Appellant's motion was dispositive. Additionally, Appellant's plea agreement form, which stated that she reserved her right to appeal the motion to suppress, was not signed by the State. The State's silence and absence of an objection to Appellant's request to reserve the right to appeal the motion to suppress were insufficient to establish a stipulation on dispositiveness. *McGoey v. State*, 736

So. 2d 31, 35 (Fla. 3d DCA 1999) (holding that there was no meeting of minds on the nature or scope of a purported pretrial stipulation); *Zeigler v. State*, 471 So. 2d 172, 176 (Fla. 1st DCA 1985) (accepting a stipulation of dispositiveness because it showed that "each [party] is willing to abide by the appellate consequences" of the stipulated issue). To stipulate to dispositiveness, the State was required to agree that no further proceedings would follow the appeal. *Hicks*, 277 So. 3d at 168 (Winokur, J., concurring) (observing that even an issue that is not, in fact, dispositive may be reserved by stipulation if the State agrees that the appeal will end the litigation). Because there was no meeting of the minds between Appellant and the State on whether the appeal would bring an end to the prosecution, there was no stipulation on dispositiveness. *Arrington v. State*, 233 So. 2d 634 (Fla. 1970) ("[T]he essence of a stipulation is agreement between opposing counsel.").

Conclusion

Because Appellant's motion to suppress was neither dispositive on the merits nor stipulated to by the State, it was not an appealable order. Appellant entered her original no contest plea under the mistaken belief that she would be able to appeal her motion to suppress. Thus, the trial court erred in failing to allow Appellant to withdraw her plea.

REVERSED and REMANDED.

ROWE, J., concurs; MAKAR, J., concurs in part with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring in part.

At oral argument, appellate counsel for the State began by saying this case is a "mess," which in large measure is true because little doubt exists that Kathgret R. Rentz entered her plea under the mistaken belief that the prosecutor had agreed that her motion to suppress was dispositive, and thereby appealable.

No question exists that Rentz entered her plea believing the prosecutor agreed that the suppression issue was dispositive; indeed, the trial court deemed the issue dispositive, and the prosecutor neither said nor did anything at that time to dissuade that view. Soon thereafter, just before sentencing, Rentz learned that the prosecutor changed positions and refused to stipulate that the suppression issue was dispositive, thereby potentially subjecting her to retrial even if she succeeded on appeal. She filed her motion to withdraw her plea before sentencing, which the trial court summarily denied.

On appeal, the State takes the position that the suppression motion was dispositive under *Churchill v. State*, 219 So. 3d 14, 18 (Fla. 2017), because the State says now, and allegedly agreed initially below, that it will not seek to prosecute Rentz if she prevails on the merits of her suppression motion in this appeal; the State acknowledges, however, that the suppression motion is not legally dispositive in the sense that sufficient independent evidence exists to prosecute Rentz without the evidence sought to be suppressed.

This matters naught because the pertinent issue on appeal is not whether the motion to suppress was dispositive legally; instead, the relevant focus is on whether the vacillating positions of the prosecutor in the trial court established a proper basis or good cause for Rentz to withdraw her original plea based on mistake, misapprehension, or circumstances adversely affecting her rights. *See, e.g., Yesnes v. State*, 440 So. 2d 628, 634 (Fla. 1st DCA 1983) (noting that "mistake, surprise, misapprehension" are grounds for withdrawing pleas). A showing of good cause requires that relief be granted; a lesser showing makes it discretionary but liberally exercised in a defendant's favor. *See* Fla. R. Crim. P. 3.170(f) (2019) ("The court *may* in its discretion, and *shall* on good cause, at any time before a sentence, permit a plea of guilty or no contest to be withdrawn . . .") (emphasis added); *Tanzi v. State*, 964

So. 2d 106, 113 (Fla. 2007) (noting that the presentence standard of subsection (f) "is favorable to defendants, and trial courts are encouraged to liberally grant motions made before sentencing"); *Yesnes*, 440 So. 2d at 634 ("Use of the word 'may,' . . . suggests that the rule also allows, in the discretion of the court, withdrawal of the plea in the interest of justice, upon a lesser showing than *good cause.* In any event, this rule should be liberally construed in favor of the defendant."); *see also Hypes v. State*, 163 So. 3d 745, 747 (Fla. 1st DCA 2015) ("trial court has no discretion to exercise where the defendant established good cause for withdrawing a plea"); *see generally* William H. Burgess, III, 16 Fla. Prac. *Sentencing* § 1:21 (2019-2020 ed.) ("When a defendant moves to withdraw his or her plea, the court should be liberal in exercising its discretion to permit the withdrawal, especially where it is shown that the plea was based on a failure of communication or a misunderstanding of the facts or law.").

The dispositive point is that the State says it has no reason to doubt and does not contest that the prosecutor materially changed positions causing acute prejudice to Rentz as alleged in her motion. The State claims, however, that Rentz is stuck with her initial plea, despite the flip-flop and doubt created in the trial court.

At a minimum, the record in this case—buttressed by the State's representations at oral argument—establish that: Rentz entered her plea on the justifiable view that the prosecutor agreed her suppression motion was dispositive; the trial judge held that her motion was dispositive and the prosecutor neither objected nor expressed any disagreement; and the prosecutor changed positions and told Rentz the suppression motion was not dispositive, such that she could be subject to prosecution even if she were successful in her appeal of the suppression issue.

Under these circumstances, where Rentz faced a moving target as to the State's position on the appealability of her motion to suppress and the possibility of prosecution even if successful on appeal, and no evidence suggests that her doubt is other than genuine and in good faith, her motion to withdraw her plea demonstrated good cause and should have been granted. *See, e.g.*, *Nicol v. State*, 892 So. 2d 1169, 1172 (Fla. 5th DCA 2005) (good cause to withdraw plea existed where defendant demonstrates

that plea was based on misapprehension); *see generally* Burgess, *supra*, § 1:21 ("The underlying principle is that the defendant should not be penalized for an honest misunderstanding . . . and that the ends of justice will best be served by allowing the defendant to withdraw his or her plea."). For this reason, I join that part of Judge Thomas's opinion concluding that Rentz is entitled to relief because she entered "her original no contest plea under the mistaken belief that she would be able to appeal her motion to suppress."

Luke Newman of Luke Newman, P.A., Tallahassee, for Appellant.

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