IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

July 8, 2011

D.J.P., JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D10-2439
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Upon consideration of the Appellant's motions for rehearing and rehearing en banc filed May 11, 2011, it is

ORDERED that the Appellant's motion for rehearing is granted to the extent that this court's opinion dated May 6, 2011, is withdrawn, and the attached opinion is issued in its place. The opinion has been amended to add a concurrence. The motion for rehearing en banc is denied. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES R. BIRKHOLD, CLERK

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

D.J.P., JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D10-2439
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed July 8, 2011.

Appeal from the Circuit Court for Hillsborough County; Christopher C. Sabella, Judge.

James Marion Moorman, Public Defender, and Karen M. Kinney, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Danilo Cruz-Carino, Assistant Attorney General, Tampa, for Appellee.

WHATLEY, Judge.

D.J.P. appeals an order adjudicating him to be delinquent after he admitted committing the offenses of burglary of an unoccupied dwelling and grand theft of a firearm. Although D.J.P. attempted to reserve his right to appeal the denial of a motion to suppress his confession, we conclude that the motion was not dispositive and affirm. At the hearing on the motion to suppress, the trial court and the State noted that

there was no stipulation that the motion was dispositive. The trial court stated, "In fact it was the State that refused to stipulate because they believe they could go forward even [if the motion had been granted]." Thereafter at the change of plea hearing, the State asserted that there were other witnesses who could identify D.J.P.

In M.N. v. State, 16 So. 3d 280, 281 (Fla. 2d DCA 2009), the appellant entered a plea to the charges contingent on his ability to appeal the denial of a pretrial motion, the trial court accepted the plea and noted the appellant's reservation of his right to appeal, but the trial court failed to expressly find that the motion was dispositive. This court affirmed in M.N., holding that the appellant's motion was not dispositive because the State could go forward at trial even if the appellant had prevailed on the appeal of the trial court's order. Id. at 281-82; see also Weber v. State, 492 So. 2d 1166, 1167 (Fla. 4th DCA 1986) (refusing to infer stipulation where there was no language in the transcript that could be construed to be a stipulation and the State's factual bases for the charge indicated that the confession was not dispositive).

Accordingly, we affirm.

VILLANTI, J., Concurs specially with opinion.
SILBERMAN, C.J., Concurs specially with opinion.

VILLANTI, Judge, Specially concurring.

I fully concur in the majority opinion but write to note that D.J.P.'s failure to obtain a definitive ruling on the dispositiveness of his motion from the trial court precludes review of the denial of that motion in this appeal. Florida Rule of Appellate Procedure 9.140(b)(2) provides in pertinent part:

> A. Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (i) . . . . A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.

(Emphasis added.) Similarly, section 924.051(4), Florida Statutes (2007), likewise provides: "If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence." (Emphasis added.) This rule and statute do not constitute a jurisdictional bar to appellate review, but they do expressly limit the issues that can be addressed on appeal following a guilty plea. Leonard v. State, 760 So. 2d 114, 118 (Fla. 2000).

The record in this case does reflect some initial uncertainty in the trial court's intent concerning a ruling on dispositiveness. However, at the change of plea hearing, the trial court clearly found, based on the State's representations as to other available evidence, that the denial of the motion to suppress was not dispositive of the charges against D.J.P. Because the only issue raised in this appeal hinges on a finding that the denial of D.J.P.'s motion to suppress was dispositive and because that denial

was not expressly found to be dispositive below, we must summarily affirm. Id. at 119 (explaining that a district court should affirm summarily when it finds that an appeal from a guilty or nolo contendere plea does not present an issue preserved in accordance with section 924.051(4)).

SILBERMAN, Chief Judge, Specially concurring.

I fully concur in the result reached in the majority opinion. I write to note that our decision does not preclude D.J.P. from filing a timely petition for writ of habeas corpus seeking to withdraw his plea as involuntary. See M.N. v. State, 16 So. 3d 280, 282 (Fla. 2d DCA 2009).

Although the trial court's ruling on D.J.P.'s motion to suppress was not dispositive, it is clear from the record that D.J.P. entered his negotiated, no contest plea to a reduced charge with the understanding that he could obtain appellate review of the order denying his motion to suppress. The plea form signed by D.J.P., his guardian, his attorney, and the trial court states in two places that D.J.P. entered his plea while reserving for appellate review the trial court's denial of his motion to suppress. Further, the transcript of the change of plea hearing reflects extensive discussion by D.J.P., his attorney, and the trial court that in entering his plea, D.J.P. would be able to obtain appellate review of the order denying his motion to suppress. The trial court elaborated as follows:

> Well, I can't give you legal advice on how to appeal. I just can't give you legal advice, but your time to file an appeal, which you absolutely have the right to do. You've reserved that right. I'm granting you that right. . . .
>
> . . . .
>
> I have no doubt that you will be fully advised on how to pursue your appellate rights that you've reserved.
>
> . . . .

> I fully expect you to appeal. I'm not offended by that and if the appellate court reverses me then I have to follow their -- their infinite wisdom.

Because D.J.P. could not get the benefit of his bargain regarding appellate review of the suppression order, his plea appears to be involuntary. Thus, D.J.P. is entitled to seek to withdraw his plea. Of course, if he is successful in doing so, he will likely lose the other benefits obtained through his negotiated plea.