

Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed November 12, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-559
Lower Tribunal No. 07-13550

Jose DeAngulo,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Dennis J. Murphy, Judge.

Joel Kaplan and Lisa H. Colon, for appellant.

Bill McCollum, Attorney General, and Magaly Rodriguez, Assistant Attorney General, for appellee.

Before COPE and ROTHENBERG, JJ., and SCHWARTZ, Senior Judge.

PER CURIAM.

Affirmed.

COPE, J. (concurring).

Defendant-appellant Jose DeAngulo appeals an order denying a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. I concur in the affirmance on the following analysis.

The defendant was charged in count one with sale of cannabis in violation of section 893.13, Florida Statutes (2007), and in count three, with attempted trafficking in cannabis, in violation of subparagraph 893.135(1)(a)1., Florida Statutes (2007). The defendant was sentenced pursuant to the plea agreement.

The defendant filed a timely rule 3.850 motion, arguing that there was an insufficient factual basis for count three. The defendant alleged that the amount of cannabis was twenty-two pounds, whereas under the trafficking statute, the minimum weight for a trafficking amount was twenty-five pounds. Id. The defendant asked the trial court to vacate count three only, but leave the remainder of the plea agreement in place. The trial court denied relief and the defendant has appealed.

In this situation, the defendant “must elect to either withdraw his plea to all charges or to none.” Quintana v. State, 917 So. 2d 991, 992 (Fla. 3d DCA 2005).

Here the defendant did not request withdrawal of the entire plea, so the trial court reached the correct result in denying relief.

The defendant maintains that the court must grant relief because attempted trafficking is a non-existent offense. That is incorrect. As a statutory matter, the offense exists. See State v. Fernandez, 546 So. 2d 791 (Fla. 3d DCA 1989). The substance of the claim is that there was no factual basis for that particular count.

Because the defendant did not seek to withdraw from the entire plea, the trial court reached the correct result in denying relief.