

IN THE SUPREME COURT OF THE STATE OF FLORIDA

OMAR WILSON, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. SC01-2083  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the District Court of Appeal,  
Fourth District

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794 SO. 2D (FLA. 5TH DCA 2001), IN ORDER TO  
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**PRELIMINARY STATEMENT**

Petitioner was the defendant in the Circuit Court, Seventeenth Judicial Circuit, in and for Broward County, and the appellant in the Fourth District Court of Appeal; Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

R = Record on Appeal

T = Transcript

**STATEMENT OF THE CASE AND FACTS**

Petitioner was on community control (R 47). He was charged with violating by failing to remain confined to his residence except for approved activities (R 52). After a final hearing, the trial court found him guilty of violating and revoked his community control (R 68).

On the date of the final hearing, the trial judge offered Petitioner a plea bargain to the bottom of his scored guidelines range, 128 months in prison, in exchange for admitting the violation. Petitioner's attorney advised the judge that Petitioner would enter an open plea. Apparently the judge did not hear that the plea was open, and began a colloquy concerning a plea to 128 months. When counsel clarified that Petitioner was entering an open plea and would present evidence to support a downward departure from the guidelines, the judge withdrew his offer and instructed that the case be set for final hearing (T 3-5).

After a break the case was called up for the final hearing. Petitioner was questioned by counsel to confirm that he did not want to accept the judge's offer but instead wanted a final hearing. The judge interjected (T 5-6):

THE COURT: And my advice to you was the court's offer was the bottom of the guidelines and in my opinion you should have taken it. Is that -

THE DEFENDANT: Excuse me?

THE COURT: Okay. Let's proceed. Let's swear in the defendant.

After revoking community control at the end of the hearing, the judge sentenced Petitioner to 150 months in prison (T 38-39; R 68).

Petitioner appealed to the Fourth District Court of Appeal. Before filing an initial brief, Petitioner filed in the trial court a Rule 3.800(b)(2) motion to correct sentencing error, alleging that he had been sentenced under the 1994 version of the guidelines held unconstitutional by Heggs v. State, 759 So. 2d 620 (Fla. 2000). The District Court then held that the motion was deemed denied because it was not ruled upon within 60 days, and reversed the denial for resentencing pursuant to Heggs. Wilson v. State, 792 So. 2d 601 (Fla. 4th DCA 2001).

Petitioner also argued on appeal that his sentence was vindictive because the trial judge offered a plea settlement to the bottom of the guidelines but then imposed a greater sentence after Petitioner rejected the offer and went to final hearing. The District Court rejected this argument, holding that Petitioner was not improperly penalized for rejecting the plea offer and that his Heggs resentencing therefore could be carried out by the same judge. Id. The District Court relied on its

own prior statement in Mitchell v. State, 521 So. 2d 185, 187 (Fla. 4th DCA 1988) (as quoted; court's ellipsis and brackets):

Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. A disparity between the sentence received and the earlier offer will not alone support a finding of vindictiveness.... Having rejected the offer of a lesser sentence, [the defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile.

In Petitioner's case, stated the court (ellipsis added):

Here, the plea offer was given and was voluntarily rejected. The trial judge made no remarks which would give an indication that the harsher sentence was being imposed as a punitive measure for rejecting the previous offer. Although the judge reiterated the plea offer at the start of the hearing, he did not refer to it again at sentencing....

Petitioner then petitioned this Court for discretionary review, alleging conflict with, among other cases, Byrd v. State, 794 So. 2d 671 (Fla. 5th DCA 2001). This Court accepted jurisdiction and consolidated this case for oral argument with Byrd, which it also accepted for review.



### SUMMARY OF ARGUMENT

In State v. Warner, 762 So. 2d 507 (Fla. 2000), this Court approved the practice of judicial plea bargaining but set forth clear safeguards in order to minimize coercion, maintain judicial neutrality, and preserve public perception of impartial justice. Those safeguards mesh with prior law prohibiting vindictiveness in sentencing for exercise of the right to trial. Where judicial plea bargaining fails and trial then leads to a conviction, the same safeguards and prior law prohibit a sentence greater than the judge's plea offer in the absence of a record of reasons for the increase based upon objective information. The Fifth District so held in Byrd v. State, 794 So. 2d 671 (Fla. 5th DCA 2001), also now on review before this Court. Byrd, unlike the Fourth District 's decision in the instant case, considered Warner and applied it to a sentence imposed after trial which was greater than the sentence the judge offered for a plea before trial. This Court should approve Byrd and reverse the instant decision.

ARGUMENT

THIS COURT MUST APPROVE AND ADOPT BYRD V. STATE, 794 SO. 2D (FLA. 5TH DCA 2001), IN ORDER TO HARMONIZE WITH EXISTING LAW THE SAFEGUARDS ON JUDICIAL PLEA BARGAINING RECENTLY ESTABLISHED BY THIS COURT IN STATE V. WARNER, 762 SO.2D 507 (FLA. 2000).

This Court is called upon in this case and in its review of Byrd v. State, 794 So. 2d 671 (Fla. 5th DCA 2001),<sup>1</sup> to decide the effect of its recent decision in State v. Warner, 762 So. 2d 507 (Fla. 2000), on sentences imposed after judicial plea bargaining. In Warner this Court imposed safeguards on judicial plea bargaining. In Byrd the Fifth District applied Warner to a case where the trial judge imposed a sentence after trial which was greater than the sentence which the judge had offered for a plea bargain. In the instant case the Fourth District did not even mention Warner when it upheld a greater sentence imposed under similar circumstances. Wilson v. State, 792 So. 2d 792 So. 2d 601 (Fla. 4th DCA 2001).

This Court should approve Byrd. The instant decision is incorrect under Byrd's application of Warner, as well as under prior case law which must be harmonized with Warner.

The general rule has long been recognized that the judicial imposition of a harsher sentence in response to a defendant's

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<sup>1</sup>State v. Byrd, Florida Supreme Court Case No. SC01-2333.

decision to stand trial rather than plead guilty is patently unconstitutional. See, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); Santana v. State, 677 So. 2d 1339 (Fla. 3rd DCA 1996); and City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985). In its instant decision the Fourth District has departed from even its own prior decisions applying this rule. See, Galluci v. State, 371 So. 2d 148 (Fla. 4th DCA 1979); Mitchell v. State, 521 So. 2d 185, 188 (Fla. 4th DCA 1988); Pasley v. State, 559 So. 2d 1167, 1168 (Fla. 4th DCA 1990); and Bush v. State, 785 So. 2d 1238 (Fla. 4th DCA 2001). It is not the first time. See, e.g., Gardner v. State, 699 So. 2d 798 (Fla. 4th DCA 1997), rev. den. 707 So. 2d 1124 (Fla. 1998); and Eltaher v. State, 777 So. 2d 1203 (Fla. 4th DCA 2001), rev. den. 799 So. 2d 217 (Fla. 2001).

The rule against harsher sentences for going to trial instead of "pleading out" is based on the due process prohibition on "vindictiveness" in increased sentences upon retrial or after rejection of a plea. See, Bordenkircher v. Hayes, supra; North Carolina v. Pearce, 395 U.S. 711 (1969); Thigpen v. Roberts, 468 U.S. 27 (1984); Blackledge v. Perry, 417 U.S. 21 (1974); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Colton v. Kentucky, 407 U.S. 104 (1972). "Vindictiveness" is "a term of art which expresses the legal effect of a given

objective course of action, and does not imply any personal or subjective animosity between the court (or a prosecutor) and the defendant." Frazier v. State, 467 So. 2d 447, 449 fn. 4 (Fla. 3rd DCA 1985); McDonald v. State, 751 So. 2d 56, 59 (Fla. 2d DCA 1999); Richardson v. State, 809 So. 2d 69 (Fla. 2d DCA 2002). In other words, "vindictiveness does not hinge on the continued involvement of a particular individual" (prosecutor or judge); the evil is "institutional pressure" (emphasis added) or "institutional bias." Thigpen v. Roberts, supra, 468 U.S. at 31; Frazier v. State, supra, 467 So. 2d at 449 .

Rather than requiring proof of an actual "retaliatory motivation" on the part of a particular judge or prosecutor, which in any event would be "extremely difficult to prove," North Carolina v. Pearce, supra, 395 U.S. at 724 fn. 20, due process focuses on the defendant: it "requires that a defendant be freed of apprehension of such a retaliatory motive...." (emphasis added), Pearce, 395 U.S. at 725. Unless the defendant is free of such apprehension, his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a trial are chilled. Pearce, 395 U.S. at 724; Richardson v. State, supra; City of Daytona Beach v. Del Percio, supra.

These considerations lead to the presumption that, when the judge has been involved in the plea negotiations and then later

imposes a harsher sentence, the sentence is "vindictive." Thigpen v. Roberts, supra, 468 U.S. at 30; McDonald v. State, supra, 751 So. 2d at 59; Stephney v. State, 564 So. 2d 1246 (Fla. 3rd DCA 1990). In the absence of judicial involvement, it is the defendant who has the burden to prove actual vindictiveness. McDonald, 751 So. 2d at 59; Richardson v. State, supra. The presumption from judicial involvement, however, may be overcome only if the record affirmatively shows that the refusal to accept the plea did not influence the sentencing decision. McDonald at 59; Frazier v. State, supra, 467 So. 2d at 449. The record must show reasons based upon objective information. Pearce, 395 U.S. at 725.

The instant case is one of judicial involvement, but the record does not show any objective reasons for the greater sentence after Petitioner rejected the judge's plea offer. It was only the judge, with no involvement from the prosecutor, who, at the beginning of the revocation hearing, offered the plea bargain for 128 months (T 4-5). At the end of the hearing, stating no reasons and putting no facts on the record, the judge imposed a sentence of 150 months (T 38-39). That this was a revocation hearing conducted by the court rather than a jury trial makes no difference; the principles are the same. See, e.g., Jones v. State, 750 So. 2d 709 (Fla. 2d DCA 2000).

Under existing case law, the Fourth District was required to apply the presumption of vindictiveness, but it did not. In the absence of the required record of reasons supported by objective information, the court instead placed the burden on Petitioner to show judicial vindictiveness or that the sentence was a "punitive measure." 792 So. 2d at 603. The court reached its decision on the basis of a negative, whereas under the presumption the negative required the opposite conclusion: the court, rather than giving Petitioner the benefit of the presumption, made the decision it did because "The trial judge made no remarks which would give any indication that the sentence was being imposed as a punitive measure for rejecting the previous offer." Id. (emphasis added). As in McDonald v. State, supra, "...that is not the test."; "...the record leaves unrebutted the inference drawn by the defendant." 751 So. 2d at 59.

The remark which the trial judge made before starting the hearing was nothing more than a threat of the greater sentence which was to come: "And my advice to you was the court's offer was the bottom of the guidelines and in my opinion you should have taken it." (T 5). Such judicial comments raise the presumption that the sentence is vindictive. See, e.g., McDonald v. State, supra ("... if you're convicted, if the jury

finds you guilty, ... you are potentially, you are facing 30 years ..."); Jones v. State, supra (judge called revocation hearing a "charade" and warned defendant that if he continued with it she would sentence him to the maximum); Stephney v. State, supra ("next time he will know to take it"); and King v. State, 751 So. 2d 691 (Fla. 2d DCA 2000) ("So now he's looking at a maximum of thirty years ... instead of the fifteen I was willing to give him today .... If you want to reconsider having some of that heard, you might save us all a lot of time").

This case, as shown, turns on judicial involvement in the plea bargain, the issue addressed by this Court in State v. Warner, supra. This Court in Warner acknowledged the historical disfavor toward judicial plea bargaining, but decided to follow "changing attitudes" toward the practice, 762 So. 2d at 509, citing Davis v. State, 308 So. 2d 27 (Fla. 1975), and allow limited judicial participation. However, this Court still saw the need to impose "certain minimum safeguards" to overcome "the concerns repeatedly expressed (such as the defendant's perception of coercion, the defendant's fear of reprisal if a plea offer is rejected ...) inherent in the plea bargaining model itself, but [which] may be magnified when the powerful 'neutral' in the system becomes embroiled in the negotiation process." 762 So. 2d at 510-511.

The following safeguards among the several set forth in Warner are relevant here: (1) "The trial court must not initiate the plea dialogue ...." 762 So. 2d at 513. The trial judge here did so. (2) "To avoid the potential for coercion, a judge must neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the defendant's right to trial." 762 So. 2d at 514. As shown above, the judge's remarks at the beginning of the revocation hearing did imply this, and the result bore it out.

Coupled with existing law, set out above, requiring the judge to state on the record reasons based upon objective information if he imposes a sentence after trial greater than the plea offer, Warner's safeguards complete the picture and bring it up to date. Certainly nothing in Warner conflicts in any way with existing law; rather, it is a clarification or at most a modification or an extension.<sup>2</sup> Whatever the specific legal term applied to the development, it was something new in Florida, something which the trial judge in the instant case did not have available to him (the trial was in 1999) and which the Fourth District did not consider.

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<sup>2</sup>It was put forth as a modification based on a decade's experience in People v. Cobbs, 443 Mich. 276, 505 N.W.2d 208 (1993), the case stating the safeguards which were "adopted" by this Court in Warner. 762 So. 2d at 513.

The Fifth District in Byrd v. State, supra, on the other hand, did grapple with the "hazards" of judicial plea negotiations aired in Warner. 794 So. 2d at 672. Byrd successfully harmonizes existing law with the additional safeguards set forth in Warner, as this Court must do. Byrd reaffirmed the presumption of vindictiveness, stating, "The Supreme Court may well have had such a presumption in mind when it required that '[a] record must be made of all plea discussions involving the court.'" See Warner, 762 So. 2d at 514." Id. (court's brackets). Certainly it must be assumed that this Court was aware of existing law. This Court should adopt the following statement in Byrd, which succinctly reconciles Warner with existing law:

... During the discussion leading up to the offer the court should state the facts relied on by it in making the offer. Those facts can then be compared with any "additional facts emerging prior to sentencing"<sup>3</sup> to see if the harsher sentence is justified. In any event, if the trial court elects to sentence more harshly based on additional facts which may emerge prior to sentencing, should the judge not at least put on record what the additional facts are and how those facts changed the judge's view? If the judge can change his or her mind merely by saying that after hearing the testimony he or she is convinced that a harsher sentence is justified, the there is

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<sup>3</sup>Court's footnote 1: "See Warner, 762 So. 2d at 514."

no protection against vindictiveness in rejection of plea cases.

Whether we call it an un rebutted presumption or merely hold that the court has failed to explain on the record what information it had at sentencing that it did not have at the time of the plea offer and how such information would have made a difference, the result is the same. ...

794 So. 2d at 672-673.

Byrd also grappled with remedies, and chose the only one which follows Warner's path: refusing to set the sentence itself, but also aware that it would be a "hollow victory" to merely return the case to the trial judge for belated findings, the Fifth District settled on acceptance of the judge's initial assessment of a proper sentence and remand for a sentence in accordance with the plea offer. Warner stated that the remedy for a defendant who has pleaded guilty or no contest would be the absolute right to withdraw the plea if the sentence exceeded the judge's preliminary evaluation. 762 So. 2d at 514. Byrd, however, pointed out that this would not cure the problem where, as here, the defendant did not plead guilty but went to trial. 794 So. 2d at 673. Where, as here, the trial judge does not make a record of reasons based upon objective information, there is shown "no reason why its pretrial evaluation of the appropriate sentence for the offense was in error...." Id. (court's emphasis).

The Second District, in McDonald v. State, supra, a case shortly predating Warner, also grappled with remedies, observing that existing case authority suggested that appropriate remedies must be fashioned case by case; like the Fifth District in Byrd, the Second sought to avoid "hollow justice." 751 So. 2d at 59-60. Remedies in cases examined by McDonald include sentencing by a different judge, sentencing within the recommended guidelines range, and imposition of a specific sentence. McDonald itself chose imposition of a specific sentence, but in Jones v. State, supra, a decision only days after McDonald became final, the Second District chose instead resentencing by a different judge.

McDonald's case by case approach would not provide courts with adequate guidance and is not clear enough to show defendants, victims and the public that trial judges are handing out even justice rather than playing a game of chance. The case by case approach also would lead to much litigation over the remedies themselves. Only across the board adoption of a clear remedy like Byrd's would fit with Warner's very specific safeguards for what this Court recognized as a "delicate" procedure, 762 So. 2d at 510, which is still against public policy in many jurisdictions, Id. at 513. The Second District

at the time of McDonald did not, like the Fifth District in Byrd, have the benefit of Warner's clear guidance.

Transparency in judicial plea bargaining is the touchstone of Warner. Warner will have little force, however, unless this Court examines the other side of the coin - what happens when judicial plea bargaining fails - with the same forthrightness which it employed in Warner and which the Fifth District employed in Byrd. Warner showed the way and Byrd followed it.

This Court must reverse the decision of the Fourth District in the instant case and remand for a decision following Byrd.

**CONCLUSION**

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal and remand this cause with proper directions.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Barbara Zappi, Assistant Attorney General, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301; Belle Schumann, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118; and to Rosemarie Farrell, Assistant Public Defender, 112 Orange Avenue, Daytona Beach, Florida 32114 this \_\_\_\_\_ day of May, 2002.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY the instant brief has been prepared with  
12 point Courier New type, a font that is not spaced  
proportionately this \_\_\_\_\_ day of May, 2002.

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