

IN THE SUPREME COURT OF FLORIDA

GERALD LYNN  
BATES,

Petitioner,

v.

STATE OF  
FLORIDA,

Respondent.

CASE NO. SC02-1481

RESPONDENT'S ANSWER BRIEF

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## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Gerald Lynn Bates, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

## SUMMARY OF ARGUMENT

Misadvice regarding the future sentencing enhancing consequences of a plea does not render a plea involuntary and is not a ground for relief in a post-conviction motion claiming ineffective assistance of counsel. Criminal defendants like all citizens have a duty to follow the law and refrain from committing criminal acts. Therefore, regardless of whether a defendant is given correct or incorrect advice about future enhanced punishment a defendant is obligated to follow the law. Moreover, unlike other collateral consequence resulting from a plea such as the loss of gain time, additional conditions of supervision, or deportation, a criminal defendant can avoid any future sentencing enhancements by refraining from committing new offenses.

Furthermore, advice on future consequences based on uncertainties is too attenuated to be relied upon. A defendant cannot expect counsel to accurately advise him as to what penalty he will receive for crimes not yet committed. Additionally, the purpose of the sentencing enhancing statutes is to discourage recidivism, and allowing a defendant to withdraw a plea many years later because it was used to enhance a future sentence will encourage recidivism. In fact, a defendant should expect to get punished for committing a new offense, and a defendant should be aware that a prior conviction for a crime may cause him to be punished more harshly than a first-time offender. Therefore, the misadvice regarding future sentencing consequences does not entitle a defendant to withdraw his plea, and should not be cognizable in a post-conviction motion.

## ARGUMENT

### ISSUE I

WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCE-ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA FOR FUTURE CRIMINAL BEHAVIOR IN AN OTHERWISE FACIALLY SUFFICIENT MOTION ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM? (Restated)

Petitioner contends that allegations of misadvice regarding the sentencing enhancing consequences that a plea will have on future criminal convictions are cognizable in a motion for post-conviction relief. The State respectfully disagrees.<sup>1</sup>

#### *Standard of Review*

The issue of whether the trial court properly denied petition for writ of error coram nobis is a legal determination which this Court reviews de novo.

#### *Argument*

Petitioner filed a petition for coram nobis challenging his 1990 possession of cocaine conviction which was used to enhance his current offense claiming that his attorney misadvised him that the conviction could never be used against him and a possession conviction could not be used as a prior offense under the habitual offender statute. Bates v. State, 818 So.2d 626 (Fla. 1<sup>st</sup> DCA 2002). The trial court denied his motion, and the First District affirmed finding that his allegation of misadvice regarding future sentencing consequences were not cognizable in a motion for post-conviction relief. Id.

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<sup>1</sup> This issue is pending before this Court in Cifuentes v. State, Case No. SC02-1136 and Woods v. State, Case No. SC02-484.

“[N]either the defense attorney nor the trial court is duty-bound to anticipate the defendant's recidivism and warn him of the sentence-enhancing consequences his plea may have for any future crimes he commits[.]” Ford v. State, 753 So.2d 595, 596 (Fla. 3d DCA 2000). In Major v. State, 814 So.2d 424 (Fla.2002), this Court held that the trial court and a defendant’s attorney are required to inform a defendant only of the direct consequences of his or her plea and have no duty to apprise him or her of the collateral consequences. Id. at 431. “The distinction between ‘direct’ and ‘collateral’ consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment. Id. citing, Zambuto v. State, 413 So.2d 461, 462 (Fla. 4th DCA 1982). This Court has held that the use of a conviction to enhance a future sentence is a collateral consequence which does not render a plea involuntary. Id. at 428-429.

Petitioner argues that although the failure to advise a defendant about the future sentencing consequences of a plea will not render a plea involuntary, that misadvice regarding future sentencing consequences will. Petitioner is incorrect. “[U]nlike other collateral consequences, such as deportation or gain time eligibility, the future sentence-enhancing effects of a guilty plea only apply if the defendant commits a future criminal offense.” Stansel v. State, 27 Fla. L. Weekly D1947 (Fla. 2d DCA August 28, 2002). “Thus, the defendant can always avoid the future sentence-enhancing effects of a plea by obeying the law.” Id. In fact, “[s]ociety places upon defendants, as it does on all citizens, an obligation to follow the law.” Id. Major v. State, 790 So.2d 550 (Fla. 3d DCA 2001)(“As a matter of common sense, a defendant is already under a legal duty not to go out and commit more crimes in the future, regardless of whether the penalty is "ordinary" or enhanced.”). Because a defendant has a duty to refrain from violating the law, “it makes no difference whether the defendant is give

correct, or incorrect, advice regarding the possibility of enhanced punishment.” Wallace v. State, 27 Fla. L. Weekly D1840 (Fla. 3d DCA August 14, 2002), citing, Scott v. State, 813 So.2d 1025, 1026-27 (Fla. 3d DCA 2002). Major v. State, 790 So.2d 550 (Fla. 3d DCA 2001)(“The defendant can avoid further sentencing consequences, enhanced or otherwise, by refraining from committing new crimes.”).

Moreover, advice on future consequences based on uncertainties is too attenuated to be relied upon. The Third District explained in Collier v. State, 796 So.2d 629 (Fla. 3d DCA 2001), that “[a]ssuming counsel advised defendant that his 1990 plea could not be used against him in the future, such advice is properly viewed as addressing the civil effects of the plea, not future recidivism. ‘Neither the court nor counsel is required to advise a defendant what penalty he can expect to receive for crimes not yet committed.’” Id. at 630, citing, Major v. State, 790 So.2d 550, 551, 552 (Fla. 3d DCA 2001).

In Rhodes v. State, 701 So.2d 388, 389 (Fla. 3d DCA 1997), the court stated that:

**As a matter of public policy, recidivism should not be encouraged. The "misadvice" allegedly given the defendant in the instant case--the possibility of an enhanced sentence on future crimes--must be distinguished from the "misadvice" given in the cases cited above--advice regarding deportation, gain time eligibility, parole eligibility. The latter issues affect only the defendant himself, whereas the former could involve the safety of the community as well. We should not encourage recidivism, even implicitly, by adopting a rule of law which requires a defense attorney or trial court to "warn" a defendant of the sentence-enhancing consequences his plea will have as to any future crimes he may commit. See Lewis v. United States, 902 F.2d 576, 577 (7th Cir.1990) ("It [the warning of future sentence enhancement] could even be viewed as an invitation to recidivism....")** Moreover, we believe that the possibility of enhanced future sentences has an even more attenuated connection to the disputed plea than do the other collateral consequences deemed sufficiently harmful to the defendant to permit vacation of his plea.

(Emphasis added). Even if warning a defendant that his conviction will have sentencing-enhancing consequences on future crimes does not encourage recidivism, certainly allowing a defendant to withdraw a plea many years later because it was used

to enhance a future sentence does encourage recidivism. “[T]he purpose of enhancement statutes is to punish and deter recidivism.” Bates v. State, at 630. “To allow [a defendant] to withdraw his plea based on affirmative misadvice of counsel concerning future sentencing enhancing consequences of his plea would frustrate this purpose.” Id.

Petitioner’s reliance on decisions of the district courts regarding misadvice about collateral consequences is misplaced. To the extent that these cases are inconsistent with this Court’s decision in Major v. State, 814 So.2d 424 (Fla.2002) and State v. Ginebra, 511 So. 2d 960 (Fla. 1987), and the public policy reasons state above the opinions should be overturned. However, these cases can also be further distinguished from the case at bar. In State v. Leroux, 689 So.2d 235 (Fla. 1996), Ray v. State, 480 So.2d 228 (Fla. 2d DCA 1985), Burnham v. State, 702 So.2d 303 (Fla. 1st DCA 1997), and Romero v. State, 729 So.2d 502 (Fla. 1st DCA 1999), in a post-conviction motion, defendants were allowed to present a claim of misadvice about the amount of time they would serve in prison or the amount of gain time they would receive. In LaMonica v. State, 732 So.2d 1175 (Fla. 4th DCA 1999), Roberti v. State, 782 So.2d 919 (Fla. 2d DCA 2001), and Walkup v. State, 27 Fla. L. Weekly D1626 (2d DCA July 17, 2002), defendants were allowed to present in their post-conviction motions claims that they were misadvised that their plea would subject them to reporting requirements of the

1997 Sexual Offender Act or the involuntary commitment provisions of the Sexually Violent Predators Act. The other cases cited by petitioner involved claims regarding misadvice about the loss of rights as a result of their plea. Joyner v. State, 795 So.2d 267, 268 (Fla. 1st DCA 2001)(misadvice that his youthful adjudication would not count as a prior conviction when it caused Joyner to loss his right to vote); Roberson v. State, 792 So.2d 585, 586-587 (Fla. 4th DCA 2001)(misadvised Roberson that he

was entering a plea to a misdemeanor when it was a felony and failed to explain to Roberson the rights he was forfeiting); State v. Johnson, 615 So.2d 179 (Fla. 3d DCA 1993)(misadvising Johnson that his felony conviction would not jeopardize his employment as a correctional officer); Ghanavati v. State, 820 So. 2d 989 (Fla. 4<sup>th</sup> DCA 2002)(misadvised Ghanavati that because the court was withholding adjudication there would never be any further repercussion relating to the charges when Ghanavati was being deported based upon his plea).

These effects are fixed at the time of plea and are not contingent of events which may or may not occur. See Bates v. State at 630. Additionally, in each of the cases the misadvice related to a consequence which resulted from the plea or conviction itself not subsequent conduct of the defendant. The consequence was not conditioned on the defendant re-offending. However, when a defendant alleges misadvice about future sentence enhancement, it is entirely within the defendant's control to avoid the enhancement by not re-offending. Furthermore, the consequence is not unexpected. A defendant should expect to get punished for committing a new offense. Moreover, "[i]t should be apparent to a defendant that a prior conviction for a crime may cause him to be punished more harshly than a first-time offender." Stansel. Therefore, the misadvice is not of such a nature that it should entitled a defendant to withdraw his plea.

The Fourth District's decision in Smith v. State, 784 So.2d 460 (Fla. 4th DCA 2000) and Love v. State, 814 So. 2d 475 (Fla. 4<sup>th</sup> DCA 2002), allowing defendants in post-conviction motions to present claims of ineffective assistance of counsel or involuntariness of a plea because of misadvice of the sentencing enhancing consequences of the plea in subsequent proceedings in contrary to public policy stated above and those cases should be overruled. This Court should affirm the reasoning of the First, Second, and Third District Courts of Appeal, and hold that

claims of misadvice regarding of the future sentencing enhancing consequences of a plea on subsequent crimes is not cognizable in a post conviction motion.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal should be approved, and the order entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on September \_\_, 2002.

Respectfully submitted and served,  
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[AGO# L02-1-10106]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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APPENDIX

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