

APPEAL NO.: SC12-481

2012 JUN 20 AM 11:03

**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**

BY 

PEDRO ORTIZ,

Petitioner/Appellant,

v.

STATE OF FLORIDA,

Respondent/Appellee.

ORIGINAL

**On Appeal from the Florida Court of Appeal for the Third District
District Court Case No.: 3D11-405**

APPELLANT'S CORRECTED JURISDICTIONAL BRIEF

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JURISDICTION

This Court has statutory jurisdiction to review the legal sufficiency of the appellate proceedings and decision below pursuant to *Rule 9.030(a)(2)(A)(iv)*, *Florida Rules of Appellate Procedure* (Fla.R.App.P.). Appellant Ortiz's present Jurisdictional Brief is filed pursuant to *Rule 9.120 (a)(5)*, Fla.R.App.P.

REFERENCES TO THE RECORD

References to relevant matters in the Record on Appeal shall be made to the Record (R.) and the page numbers of the record in which a specific document or pleading is found therein.

STATEMENT OF THE CASE

This appeal seeks review of a District Court of Appeals, Third District, Opinion, dated February 8, 2012 which conflicts with a prior opinion and/or decisions of this Court and that of other sister district courts of appeal on the same issue of law.

Particularly a defendant's entitlement to seek post disposition/post conviction relief from an illegal sentence, which sentence the defendant was to receive was understood to be a legal sentence by the defendant, but was not a legal sentence and, in fact, was no sentence at all. The significance of the issue, if not judicially corrected, shall unfairly expose a substantial number of defendants to

mandatory removal from the United States based on unequivocally null and void judicial (criminal) dispositions under Florida law.

STATEMENT OF FACTS

Substantive Facts

On or about January 10, 1996 Appellant/Defendant PEDRO ORTIZ was arrested, with a Co-Defendant, for the alleged purchase of less than 20 grams of cannabis from an undercover officer. Mr. Ortiz was subsequently charged by way of a Four (4) Count Information, along with the Co-Defendant, with one (1) felony count of purchase of cannabis and one (1) misdemeanor count of possession of cannabis less than 20 grams in violation of Section 893.13, Florida Statutes. (R1,P.5-12).

On or about January 19, 1996, Defendant/Appellant, Ortiz, through Counsel, filed pleadings entering a plea of not guilty, demanding discovery and requesting trial by jury in the underlying proceedings. (*See Insert Docket Card R1,P.1*). On January 31, 1996, Defendant Ortiz appeared before the court, presumably for purposes of a scheduled arraignment, in this cause. *Id.* On the same date, January 31, 1996, Defendant Ortiz, through Counsel, entered a negotiated plea of *nollo contendere* to the two (2) *questionably, if not duplicitous*, charged drug offenses set forth in Counts 3 and 4 of the subject Information. *See Information (R1,P.5-*

12); (See also copy of *Finding of Guilt and Order Withholding Adjudication and Special Conditions*; R1,P.15-16). In exchange for Appellant's no contest change of plea to the underlying charges, the State, along with the court, agreed to the entry of an Order withholding the adjudication of guilt in connection with the two (2) charged offenses pursuant to *Section 948.01 (2), Florida Statutes*, together with a *suspended entry of sentence (SES)*. (R1,P.150). Significantly, the trial court *did not place Defendant Ortiz on probation* as statutorily required, as a condition precedent, to a court's authority to order a suspended entry of sentence under Florida law. *Section 948.01 (2), Florida Statutes*. Additionally, the Court should note Defendant/Appellant Ortiz's no contest change of plea was entered only twenty-one (21) days after Appellant's arrest, and without the benefit of formally requested discovery from the State which Defendant had requested, through Counsel, only two (2) days prior to Defendant's no contest change of plea resulting in the underlying *illegal judicial disposition* at the center of the present appeal. (See *Insert Docket Card R1,P.1-4*).

On or about August 20, 2010, Appellant Ortiz, through newly retained Counsel, Ms. Ybarra, filed *Defendant's Post Conviction Motion for Relief From Illegal Sentence and Statutory Null and Void Judicial Disposition* (per Rule 3.800) challenging the legal sufficiency of the original judicial disposition entered by the

trial court in this cause on January 31, 1996. (*See copy of Defendant's Motion for Post Conviction Relief; R1,P.17-20*).

On or about February 8, 2011, after formal hearing on the matter, the trial court (per County Court Judge, Antonio Arzola) granted Defendant's motion for post disposition/post conviction relief under *Rule 3.800, Fla.R.Crim.P.* (*See Order Granting Defendant's Post Conviction Motion; R1,P.54-55*). On or about February 14, 2011, the State filed its Notice of Appeal seeking appellate review of the trial court's February 8, 2011 Order granting Appellant Ortiz post disposition relief (pursuant to *Rule 3.800, Fla.R.Crim.P.*) per the judicial *precedent authority* of *State v. Galazz*, 2 So. 3d 1083 (Fla. 3d DCA 2009). The State appealed. (R1,P.56).

Procedural Facts

On appeal, the Third District Court of Appeals reversed the trial court's ruling granting Appellant post disposition relief under *Rule 3.800*. Despite identical facts in this case to the facts in the *Galazz* case and the court's actual knowledge of the recent *Galazz precedent decision* consistent with this Court's decision in *Forbert* and the decisions of sister appellate courts' in *Cleveland* and *Britt*, the Third DCA chose to ignore the same in order to reverse the trial court's grant of post conviction relief in this case. (*See 3d DCA Opinion, dated February*

8, 2012; Appendix to Appellant's Jurisdictional Brief, P.1-6).

Appellant Ortiz respectfully submits the appellate Opinion, dated February 8, 2012, subject to present review not only conflicts with the precedent decisions of the same Third District Court of Appeals but, more importantly, directly conflicts with the prior opinions/decisions of this Court as set forth in *Forbert v. State*, 437 So. 2d 1079, 181 (Fla.1983) and that of sister appellate court's as set forth in *Cleveland v. State*, 394 So.2d 230 (Fla. 5th DCA 1981) and *Britt v. State*, 352 So. 2d 148 (Fla. 2d DCA 1977). On or about March 9, 2012, Defendant Ortiz filed, through Counsel Ybarra, Appellant's Notice of Appeal seeking to invoke this Court's discretionary appellate jurisdiction to review the lower appellate court's subject Opinion, dated February 8, 2012.

SUMMARY OF THE ARGUMENT

On appeal, Appellant respectfully submits the Third DCA Opinion, dated February 8, 2012, purporting to recognize an *admittedly illegal disposition*, in the form of a withhold of adjudication together with a *suspended entry of sentence*, to somehow constitute a "*de facto legal sentence*" subject to hypothetical completion by a defendant simply ignores the fact that such disposition is not merely an "*illegal sentence*" but rather a *statutorily null and void disposition, ab initio, as a matter of state law*. Thus the Third DCA's analysis of this 3.800 issue, under what

appears to be a *Rule 3.850* analysis focusing on whether the sentence has been completed, is clearly misplaced and legally unsustainable.

ARGUMENT

I. This Court Has Jurisdiction Pursuant To Rule 9.030 (a)(2)(A)(iv), Fla.R.App.P., To Determine Whether The District Court Erred In Reversing The Trial Court's Grant of Post Disposition Relief Under *Galazz*, *Forbert*, *Cleveland*, and *Britt* Thereby Rendering An Opinion In Conflict With The Prior Decisions Of This Court And That Of Other Sister District Courts

At issue is the Third DCA's Opinion in this case, dated February 8, 2012 which essential holds that a defendant may not challenge an illegal sentence or otherwise seek relief from an illegal sentence where the plea was based upon a misunderstanding or misapprehension of the facts considered by the defendant in making the plea. *State v. Ortiz*, 37 Fla.L.Weekly D 359 (Fla. 3d DCA 2012). The problem with this appellate decision is that it not only conflicts with this Court's prior decision in *State v. Forbert*, 437 So. 2d 1079, 1081 (Fla.1983) but that of sister appellate courts in *Cleveland v. State*, 394 So. 2d 230, (Fla. DCA 1981) and *Britt v. State*, 352 So. 2d 148 (Fla. 2d DCA 1977).

It is a well-established principle of law that a defendant should be allowed to withdraw a plea of guilty where the plea was based upon a misunderstanding or misapprehension of facts considered by the defendant in making the plea. *State v.*

Forbert 437 So. 2d 1079, 1081 (Fla.1983); *Brown v. State*, 245 So. 2d 41 (Fla. 1971); *Rubenstein v. State*, 50 So.2d 708 (Fla.1951). Hence when a defendant pleads guilty with the understanding that the sentence that he or she receives in exchange is legal, when in fact the sentence is not legal, the defendant should be given the opportunity to withdraw the plea when later challenging the legality of the sentence. *Cleveland v. State*, 394 So. 2d 230, (Fla. DCA 1981); *Britt v. State*, 352 So. 2d 148 (Fla. 2d DCA 1977).

Moreover, the Third DCA's present Opinion (dated February 8, 2012) inexplicably chose to disregard the prior precedent decision of its own court rendered in the analogous and factually identical case of *State v. Galazz*, 2 So. 3d 1083 (Fla. 3d DCA 2009). In *Galazz*, the defendant entered into a plea agreement with the State regarding the charge of purchase, or possession with intent to purchase cocaine. Pursuant to the agreement, the defendant admitted the offense in exchange for a withhold of adjudication and a suspended entry of sentence ("SES"). *Two and one-half years later*, the defendant filed a *Rule 3.800(a)* arguing the sentence was illegal. The trial court vacated the sentence and the plea. The State appealed the trial court's grant of post conviction/post disposition relief to the defendant. Significantly, in *Galazz*, the trial court ruled that a suspended sentence, standing alone, is an illegal sentence.

Notably, this Court has held that “...*the power to suspend the imposition of sentence upon a convicted criminal can be exercise by a trial judge only as incident to probation under the provisions of Chapter 948, Florida Statutes. Helton v. State*, 106 So. 2d 79, 80 (Fla.1958); *Mazza v. State*, 948 So. 2d 872, 874-875 (Fla. 4th DCA 2007); *Sainz v. State*, 811 So. 2d 683, 686-688 (Fla.3d DCA 2002).

Appellant recognizes that there are *Rule 3.800(a)* cases in which a sentence could be modified to correct an illegality. For example, in *Ruiz v. State*, 537 So. 2d 682 (Fla.3d DCA 1989), the agreed sentence exceeded the legal maximum. The Third DCA ruled that the sentence could be reduced to the legal maximum with the State’s consent. Alternatively, if the State refused to consent to a reduced sentence, then the defendant would be allowed to withdraw his plea. *Id.*, at 683.

In this case however, like in *Galazz*, the sole disposition was *suspended entry of sentence (“SES”)*, *which was no sentence at all*. To render the SES disposition legal, it would be necessary to add a term of probation, which was not bargained for and which would increase the sentence in violation of double jeopardy principles. *State v. Galazz*, 2 So. 3d 1083, 1084 (Fla.3rd DCA 2009). Here, like in *Galazz*, as the plea agreement could not be carried out and the Defendant opted to withdraw his plea, the trial court correctly vacated Defendant/Appellant’s plea and the court’s prior judgment and sentence thereby

leaving the original charges pending against Defendant Ortiz. The Third DCA's subsequent disapproval of the trial court's proper ruling in this case, consistent with the precedent authority of *State v. Galazz* and this Court's prior decisions in *Forbert* and *Brown*, constituted a conflicting judicial departure from the essential requirements of law resulting in substantial prejudice to Appellant for which there is no adequate remedy at law by direct appeal.

Finally, subjecting the Third DCA's Opinion to minimal scrutiny, the procedural unreasonableness of the decision becomes readily evident. In its literal application, the Third DCA's decision would render a defendant, subject to such an *illegal disposition*, without post disposition/post conviction relief there from *immediately upon the trial court's pronouncement of the same on the basis that the purported "sentence" has already been completed by the defendant and therefore the issue of an "illegal sentence" would already be moot*. As if this procedural consequence was not sufficiently unreasonable in and of itself, the additional procedural consequence of undermining the substantive purpose of *Rule 3.850*, with respect to such *"illegal dispositions"*, should be more than enough to persuade this Honorable Court to disapprove the subject Ortiz decision. *State v. Ortiz*, 37 Fla. L. Weekly D 359 (Fla. 3d DCA 2012).

Appellant respectfully submits the present issue to be a matter of great public importance as a substantial number of persons residing within this State have been the subject of prior criminal proceedings in which such statutorily null and void judicial dispositions have been entered which, standing alone, cannot be sustained as a matter of Florida law but yet continue to unfairly prejudice their respective *substantial right to lawfully remain in the United States; unless otherwise subject to lawful removal there from pursuant to legally sufficient, proper due process of law.*

CONCLUSION

For the above stated reasons, Appellant Pedro Ortiz prays this Honorable Court accept appellate jurisdiction to review this cause on the merits.

Respectfully submitted,

By: 

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the Font requirements of *Rule 9.210(a)(2)*, and the page limitation for Jurisdictional Briefs prescribed in *Rule 9.210 (a)(5), Florida Rules of Appellate Procedure*.

By: 
ANDRES A. QUINTERO, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via facsimile and U.S. Mail this 18th day of April, 2012 on Nicolas Merlin, Esquire, 444 Brickell Avenue, Suite #650, Miami, Florida 33131; and Grisel Ybarra, 2320 S.W. 57th Avenue, Suite #201, Miami, Florida 33155 and the original thereof served on the Clerk of the Supreme Court of the State of Florida.

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