

IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

CASE NO.: SC 14-2009
DCA CASE NO: 1D11-1828
L.T.: 01-2009-CF-003206-A

DANNIE S. HOLDEN

Petitioner,
v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

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PREFACE

Dannie Stanford Holden, Jr., was the defendant below and will be referred to in this brief as appellant. "R" refers to the record as filed in SC14-1828.

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I. Statement of the Case and Facts

A second amended information charged appellant with sexual battery on a person less than twelve years of age and resisting an officer without violence. (R-66). Appellant pleaded *nolo contendere* to the lesser offense of attempted sexual battery and resisting without violence. (R-143-149, 647-667). Appellant indicated he desired to reserve the right to appeal the denial of his motion to suppress his confession. (R-667). With respect to that, the record indicates:

"The Court: I'm not sure the statement is dispositive. I mean, he can reserve his right to appeal, but I don't want to make a comment on whether it's dispositive or not. So he can reserve his rights to appeal whatever matters the law allows him to appeal. I would be fine with that.

Mr. Slavichak: The state's comfortable with that.

Ms. Haedo: Let me just explain that, because we're used to talking about that. What that means, Mr. Holden, for our purposes is that the statement in and of itself, the words that you uttered and said to Detective Mayo, may not be -you may not have said it to -so that the jury could turn around and find a guilty on sexual battery. Is that pretty fair?

The Court: Well, I would say it a little differently, and I'm stating this in this way because I'm not-I don't consider myself a legal expert in this area, but I would state that I think in order to reserve your rights to appeal issues, the issue has to be what we call dispositive. What that means is the state could not go forward without this evidence. In this case I think the state could go forward. If I would have made a different ruling and granted your motion to suppress, I think the State -I'm not sure whether they would have, but could have gone forward with the case irrespective of that. So I don't know if this issue is dispositive. I would say it this way, if you want to reserve your right to appeal whatever issues or issue, in this case the suppression issue, if you're legally entitled to appeal it, then I have no problem with that being said."

(R-668-669).

Defense counsel later stated she wished to preserve issues relating to child hearsay statements made to a Department of

Children and Families as being a violation of *Crawford v. Washington*, 541 U.S. 36 (2004). Again the court noted:

"The Court: Okay. Again, the court is not trying to stop the defendant from appealing any issues that he feels are legally dispositive. I'm not making a comment on whether that issue is dispositive or not, and it may be, it may not be. I mean, that's the state of it. But it was my understanding in this case that the alleged victim was going to testify as well, that the state was prepared to call the alleged victim."
(R-672).

The First DCA reviewed the *Anders*¹ appeal, in *Holden v. State*, 51 So.3d 510 (Fla. 1st DCA 2012) (Appendix at 1), in which the Appellant entered a plea of *nolo contendere* to the lesser included charge of attempted sexual battery and resisting arrest without violence. The Appellant preserved two issues for appeal pursuant to Fla. R. App.P. 9.140(b)(2)(A): the denial of his motion to suppress his confession and the trial court's determination on the admissibility of the child victim's out-of-court statements to a Child Protective Team ("CPT") interviewer and the doctor who performed the forensic medical evaluation.

The trial court erroneously declined to determine whether the identified issues were dispositive and the State did not stipulate to dispositiveness. In *Holden*, the First DCA determined that both of the issues that the Appellant reserved were not dispositive, affirming the trial court. The First DCA, citing to *Brown v. State*, 376 So.2d 382, 385 and *Leisure v. State*, 429 So.2d 434 (Fla. 1st DCA 1983) noted that the Appellant is precluded from preserving

¹ *Anders v. State*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d

the trial court's failure to suppress a confession absent a Stipulation by the State that the issue is dispositive.

On the admissibility of the child hearsay statements, the *Holden* Court applied a *de novo* review standard, finding that the "record on appeal contain[ed] overwhelming evidence" that the State could have proceeded to trial regardless of whether Appellant was successful in his appeal of this issue so that it was also deemed to not be dispositive, citing to *Williams v. State*, 37 Fla. L. Weekly D800 (Fla. 1st DCA 2012) ("An issue is dispositive only when it is clear that there will be no trial, regardless of the outcome of the appeal), This Court granted the Petitioner's original petition seeking belated discretionary review on October 30, 2014. (Appendix at 8).

II. Summary of Argument

The trial court erroneously declined to determine whether the identified issues were dispositive and the State declined to stipulate to dispositiveness. While there is precedent for the appellate court to determine whether a R. App. P. 9.140(b)(2)(A) issue is not dispositive "for the purposes of judicial economy" (See *Rust v. State*, 742 So.2d 471 (Fla 2nd DCA 1999), this is counter to both R. App. P. 9.140(b)(2)(A) and to cases wherein it was held that "when a trial court receives a plea subject to the requirements of rule 3.172 . . . and the defendant reserves a question of law for appeal, the trial court *is obligated to*

determine the dispositive nature of the reserved question." *Everett v. State*, 535 So.2d 667,669 (Fla. 2d DCA 1988) (Emphasis added), citing *Leisure v. State*, 429 So.2d 434 (Fla 1st DCA 1983). The trial court erred by merely acknowledging the Appellant's nolo plea without advising the Appellant of which issues it deemed dispositive and failing to advise the Appellant whether, preserved or not, that certain issues were being waived by entering into a nolo plea agreement.

III. Argument - DID THE TRIAL COURT ERR BY MERELY ACKNOWLEDGING THAT THE DEFENDANT RESERVED ISSUES FOR APPELLATE REVIEW

The record here is clear that the trial court gave Appellant the impression that by entering a nolo plea he was not waiving his right to appeal the issues which he had preserved. The record indicates that the Appellant's conditional nolo plea was predicated on the trial court's noting that it "is not trying to stop the defendant from appealing any issues that he feels are legally dispositive" (R-672), and the resulting implication that by entering into a plea agreement he was not waiving the right to appeal the preserved issues. Fla R. App. P. 9.140(b)(2)(A)(i) provides that a defendant who pleads nolo contendere may expressly reserve the right to appeal *a prior dispositive order of the lower tribunal*. (Emphasis added). As a general rule, defendants may not directly appeal after pleading guilty or *nolo contendere*. Fla. R. App. P. 9.140(b)(2)(A). However, a defendant will be permitted to appeal certain issues after pleading guilty or nolo contendere if

the right to appeal is properly reserved. Fla. R. App. P. 9.140(b)(2)(A)(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). Further, §924.06(3), Fla. Stat. (2008) provides that a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to a direct appeal." §924.06(3), Fla. Stat. (2011). Thus, without both an express reservation of the right to appeal and a finding that the issue is dispositive, through either the trial court's ruling or a stipulation by the state, a defendant who pleads guilty or nolo contendere has no right to a direct appeal. *Pamphile v. State*, 65 So.3d 107,108 (Fla. 4th DCA 2011). Essentially, the trial court erred by not only failing to determine whether the Appellant's preserved issues were dispositive but also by failing to explain whether, even with the proper preservation of issues for appeal, certain issues were, in fact, waived, giving the Appellant the impression that he was not waiving any of his preserved issues.

Here, the Appellant properly preserved the two issues for appeal while both the State and the trial court did not take any position as to whether the issues were dispositive. These failures at the lower court level together with *Brown v. State*, 376 So.2d 382, 385 (Fla. 1979) and *Jackson v. State*, 382 So.2d 749 (Fla. 1st DCA 1980) (The denial of a motion to suppress confession cannot be

preserved for appeal absent a stipulation by the State) and *Rust v. State*, 742 So.2d 471 (Fla. 2d DCA 1999) (Where the Court approved for purposes of judicial economy the ability of the appellate court to complete a *de novo* review and make a determination as to whether issues are dispositive in the place of the trial court), "leaves the Appellant with the misleading formation of a belief . . . that relief from judgment and sentence can be achieved in the appellate court". *Everett v. State*, 535 So.2d 667, 669 (Fla. 2d DCA 1988).

As noted in the dissent in *Holden*, "[w]hen a trial court receives a plea pursuant to Florida Rule of Criminal Procedure 3.172, and the defendant seeks to reserve a question of law for appeal, it is well settled that the trial court is obligated to determine the dispositive nature of the question or questions." Citing *Everett*, *Id.* In *Leisure v. State*, 429 So.2d 434,436 (Fla. 1st DCA 1983), the Court noted that "[i]n these and other cases where the issue reserved does not involve a confession, the trial judge has wide discretion to accept or reject a conditional *nolo* plea based on his perception of the dispositive nature *vel non* of the legal issue reserved for appeal. Moreover, his decision will be overturned only upon a showing of a clear abuse of discretion." Citing *Brown*, *Id.*

The *Leisure* court continued:

"In this case, although the trial court exercised its discretion by accepting appellant's conditional *nolo* plea, it failed to make an express finding on the question of whether the issue reserved on appeal was dispositive of the case. When appellant pled *nolo contendere* reserving his right to appeal the denial of the motion

to suppress, the trial court noted on the record that the State had not stipulated to the dispositiveness of the issue reserved on appeal, and then proceeded to accept appellant's nolo plea without making an express finding as to whether the issue was dispositive of the case

* * *

Although it is unclear whether the trial judge actually believed that the motion to suppress was a dispositive issue in this case, it is clear that the trial court gave appellant the impression that by entering a nolo plea he was not waiving his right to appeal the suppression issue. From this fact, we must conclude that appellant's conditional nolo plea was predicated on the trial court's instruction to him that by entering this plea he was not waiving the right to appeal the suppression issue. Under these circumstances, we believe that a finding of dispositiveness is implied from the record, and therefore, we do not hold that appellant has waived his right to appeal the ruling on the motion to suppress merely because the trial court failed to expressly find that the issue was dispositive."

Id. at 436.

The *Leisure* Court then concluded that "[o]n that basis, in an effort to be fair to both appellant and the State, we have determined to leave the question up to the trial court." *Id.* at 437. Finally, the *Leisure* court best outlined the argument that the obligations of the trial court to not only make clear to the defendant what issues he or she is or is not waiving when accepting a nolo plea, but also findings of dispositiveness should remain with the trial court in order preserve the rights and expectations of defendants entering into *nolo contendere* agreements:

"To avoid any future uncertainty as to whether a defendant has, in fact, properly preserved his right to appeal an issue following the entry of a conditional nolo plea, we suggest the following procedure. When a defendant seeks to reserve on appeal an issue involving the suppression of a confession, the trial court should advise the defendant that, absent a stipulation of dispositiveness from the State, he cannot reserve the right to appeal the suppression of the confession based on a conditional nolo plea. If the State declines to stipulate to the dispositiveness of the confession issue, the trial court should not accept the defendant's

nolo plea unless it determines that the defendant understands that by entering the nolo plea he is waiving his right to appeal. If the issue sought to be reserved on appeal does not involve the suppression of a confession, the defendant will always have some burden of demonstrating that the issue is dispositive. If the State believes that the issue is not dispositive, it should explain to the court the additional evidence upon which the defendant might be convicted. At this point, the court should make an express determination of whether the issue is dispositive of the case. If the court decides that the issue is not dispositive, it should not accept a nolo plea unless the nolo plea is specifically entered without reservation of the right of appeal and the trial court is satisfied that the defendant understands that by entering the nolo plea he is waiving his right to appeal."

Id.

The *Everett* court, despite ultimately affirming the trial court's denial of the Appellant's suppression motions, succinctly outlined the error that this Appellant believes occurred below:

"Before turning to the two issues we have concluded to review, however, we find it appropriate to emphasize that when a trial court receives a plea subject to the requirements of rule 3.172 of the Florida Rules of Criminal Procedure and the defendant reserves a question of law for appeal, the trial court is obligated to determine the dispositive nature of the reserved question. See *Leisure v. State*, 429 So.2d 434 (Fla. 1st DCA 1983). A trial court, as occurred here, errs if it merely acknowledges that the defendant has reserved an issue for appellate review. There are at least two cogent reasons for imposing an obligation upon the trial court to assess and determine whether the reserved question of law will control the outcome of the case. First it enhances the likelihood that a meritless appeal will not be pursued, and second, it pretermits the potentially misleading formation of a belief in the defendant that relief from the judgment and sentence can be achieved in the appellate court. Moreover, and as a corollary to the foregoing, it would insure a timely opportunity for the defendant to evaluate withdrawal from the plea agreement. Indeed, it appears from the present record that had the trial court and *Everett's* counsel been aware of the *Brown* impediment to reserving for appeal the propriety of the refusal to suppress *Everett's* confession, and made such fact known to him, he may have withdrawn his nolo plea, an effort he undertook at a time when the trial court's jurisdiction had terminated by reason of the filing of the notice of appeal in the present matter."

Everett, at 669.

This same concept is addressed in *Holden* by Justice Swanson's dissent: "[a]s discussed in Judge Benton's concurring opinion, one could reasonably conclude Appellant's plea was induced by a belief that the trial court rulings on the confession and child hearsay issues would be addressed on appeal. Remand, as contemplated by this dissent, would result in further proceedings where the defendant had the benefit of counsel. At that point, the defendant would at least have the opportunity to further consider, with the benefit of counsel, whether to file a motion for relief from judgment. Fla. R. Crim. P. 3.850(A)(5). Given the totality of this record, I conclude the Appellant should be given that opportunity." *Holden*, *Id.* at 905.

Here, as in the majority opinions in *Leisure* and *Everett* and the dissent in *Holden*, the underlying issue on appeal involves the Appellant/Defendant's expectation as to how the appeal will proceed and whether he was informed or under the belief that the issues were preserved for appeal and were not waived because of a failure of the trial court to find dispositiveness and/or the State's failure to stipulate to dispositiveness. The trial court, here, erred by not only failing to determine whether the Appellant's preserved issues were dispositive but also by failing to explain to the Appellant that even with the proper reservation of issues for appeal certain issues are waived. It is error to give the Appellant the impression that he was not, effectively, waiving any of his preserved issues.

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Court exercise jurisdiction by reversing the order being appealed with instructions to remand to the trial court for further proceedings, including but not limited to, if necessary, the ability of the Appellant to file a motion for relief from judgment pursuant to Fla. R. Crim. P. 3.850(A)(5).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at:

Criminalappealsintake@myfloridalegal.com , and by U.S. mail to appellant, Dannie Holden, #G02806, Liberty C.I., 11064 N.W. Dempsey Barron Rd., Bristol, FL 32321, on this 16th day of January, 2015.

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font standards, i.e., Courier New 12-point font, as set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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