IN THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT OF FLORIDA

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APPEAL NO.: 01-57AP

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JOHN SHARPE

Appellant-Petitioner,

v.

STATE OF FLORIDA

Appellee-Respondent.

_____

A DIRECT APPEAL FROM THE COUNTY COURT, FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY, FLORIDA OF A DENIAL OF A MOTION TO VACATE AND SET ASIDE A JUDGMENT AND SENTENCE UNDER RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE

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CORRECTED
REPLY BRIEF OF APPELLANT

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STANDARD OF REVIEW

The State cites three cases for the proposition that the appropriate standard of review is abuse of discretion. This is wrong. The cases cited by the State are not on point. The State cites *Bacon v. State*, 738 So.2d 973 (Fla. 4th DCA 1999), *Hunt v. State*, 613 So.2d 893 (Fla. 1993), and *Lines v. State*, 594 So.2d 322 (Fla. 1st DCA 1992). Each of these cases was a direct appeal of a denial of a motion to withdraw a plea made either prior to or after sentencing under Rule 3.170(f) or (l) of the Florida Rules of Criminal Procedure. An appeal of the denial of a motion to withdraw a plea under Rule 3.170 is subject to an abuse of discretion standard *because the motion itself is subject to an abuse of discretion standard*. In the *Lines* case, for example, the defendant pled no contest then prior to sentencing filed a motion to withdraw his plea under Rule 3.170(f) stating that he had not known that insanity was a defense to the charge. He put on no evidence to show that he would have had an insanity defense. The trial court denied the motion to withdraw his plea and proceeded to sentence him. The motion itself and the appeal were subject to an abuse of discretion standard. *Hunt* and *Bacon* presented similar scenarios.

This standard and Rule 3.170 has nothing to do with the instant appeal. Mr. Sharpe filed a *Writ of Error Coram Nobis* under

the authority of *Peart v. State,* 756 So.2d 42 (Fla. 2000) and *Wood v. State*, 750 So.2d 592 (Fla. 1999). *Wood* teaches that *Writs of Error Coram Nobis* are to be treated as motions under Rule 3.850, Florida Rules of Criminal Procedure.

A motion to vacate a judgment and plea under Rule 3.850 is not subject to an abuse of discretion standard, but rather turns on the particular issue presented and the appropriate governing standard for that issue. As a general proposition on appeal of a denial of a 3.850 motion, matters of law are subject to *de novo* review, matters of fact are subject to due deference and mixed questions of fact and law are subject to *de novo* review, as explained in Appellant Sharpe's initial brief.

COMPETENT, SUBSTANTIAL EVIDENCE

As the First District Court of Appeal stated in *Thomas v. State*, 27 Fla. L. Weekly D 394 (Fla. 1st DCA 2002), findings of fact must be supported by "competent, substantial evidence." *Notably Judge Drayton-Harris did not make any specific fact findings in her order.*

Instead, Judge Drayton-Harris concluded without any specific fact findings that Mr. Sharpe "was placed on *adequate notice."* [R30] This is clearly a mixed question of law and fact subject to *de novo* review.

Although Judge Drayton-Harris made no specific fact findings, the State in its answer brief has stipulated to the statement of

facts in Appellant Sharpe's initial brief. [State's Answer Brief at p. 1] One of the statements of fact that the State has stipulated to is that "[n]o one told Mr. Sharpe he could never get his license back." [Appellant Sharpe's Brief at p.3]

Indeed there is nothing in the record that contradicts this. There is nothing in the record to support any finding that Mr. Sharpe was on notice that his license would be revoked for life based on the plea he entered in this case. *The only competent, substantial evidence in this record is that Mr. Sharpe was not on notice of the lifetime revocation that came automatically as a direct result of his plea in this case*. The State has stipulated to the controlling fact. Given that stipulation Mr. Sharpe is entitled to relief.

WHIPPLE* AND *DANIELS

The State attempts to distinguish *Whipple* and *Daniels* on their facts. This effort is in vain. *Whipple* and *Daniels* flatly hold that the driver's license revocation under Florida Statutes § 322.28 is a *direct consequence* of a plea (under § 316.193 in *Whipple* and under Chapter 893 in *Daniels*) that *the court must advise the defendant* of before accepting a guilty plea, and that the failure to do so entitles the defendant to withdraw the plea.[1]

[1] In fact, the *Whipple* case - based on its facts - appears to create a *per se* rule entitling a defendant to set aside a plea even if he knows of the revocation consequence so long as the *Court* fails to advise the defendant of the fact in the plea

The State fails to cite a single case for the proposition that the failure of the court to advise the defendant of a lifetime driver's license revocation (or a revocation of any other duration) does not entitle the defendant to withdraw his plea, when the conviction from that plea directly triggered the license revocation as a matter of law. The State failed to cite any supporting authority for its argument because there is no such authority. This Court is bound by *Whipple* and *Daniels* and Mr. Sharpe is entitled to relief.

FAILURE OF COURT TO DETERMINE FROM COLLOQUY WITH DEFENDANT THAT PLEA IS KNOWING, INTELLIGENT AND VOLUNTARY

Judge Blackburn engaged in no plea dialogue with Mr. Sharpe whatsoever. We are not addressing in this appeal a defective plea dialogue but no dialogue at all.

Sharpe cited numerous cases in the initial appeal brief in which pleas were vacated under Rule 3.850 even when there was a complete *written plea agreement* but a deficient oral plea colloquy

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colloquy. We say that, because a close examination of the facts in the *Whipple* case shows that Whipple himself testified that he expected a five year revocation and that his lawyer had warned him of that, and under the holding of *Whipple* that was all the court could impose on remand in any case. *Whipple* has two holdings - the first was that the lifetime revocation was error and the maximum revocation would be *five years*. Whipple testified that was what he expected. It was only the judge below who failed to warn Whipple of a five year or any other revocation and that failure was the basis for the second holding in *Whipple* - that the revocation of the driver's license under § 322.28 is a direct consequence of the § 316.193 plea that the court *must advise* the defendant under Rule 3.172 and the failure to do so was reversible error.

under Rule 3.172. *Cf. Joseph v. State*, 2001 Fla. App. LEXIS 7380; 26 Fla. L. Weekly D 1385 (Fla. 2nd DCA 2001) (written plea form signed by defendant not sufficient to satisfy requirement that trial judge orally advise defendant of rights and ascertain knowing waiver), *Perriello v. State*, 684 So.2d 258 (Fla. 4th DCA 1996) (written plea form read to defendant by attorney advising of deportation consequence of plea not sufficient to satisfy court's obligation to advise defendant); *Childers v. State*, 782 So.2d 513 (Fla. 1st DCA 2001) (although a defendant may have signed a plea which addressed some of what Fla. R. Crim. P. 3.170 requires that a defendant understand before agreeing to a plea, if the record does not show that the trial court informed the defendant of the points in the rule and that the defendant understood the written form, much less whether the defendant could even read, the plea was involuntary and the defendant may withdraw his plea of guilty or nolo contendre). *See Koenig v. State*, 597 So.2d 256 (Fla. 1992).

If a deficient plea colloquy that is supported by a complete written plea agreement and its attendant advice of rights and consequences is legally insufficient and entitles the defendant to withdraw his plea, then a deficient - or totally lacking plea dialogue alone, without any written plea agreement cannot be sufficient under Florida law.

The State argues at p. 19 of its brief that "there is no indication in the record that the Appellant in the instant case was

poorly advised or unwittingly subjected himself to an unanticipated sentence." This statement flies in the face of the *undisputed and stipulated facts*. It is clear that he had no idea he was going to receive a lifetime driver's license revocation as a result of his plea.

It is equally clear that it was ineffective assistance of counsel to put a client in such a position. What Judge Blackburn did in falsifying the state of the record in her order finding Mr. Sharpe convicted of a third DUI when in fact, as she and the State knew, it was his fourth DUI, had no effect whatsoever on the automatic lifetime revocation under § 322.28. Indeed, this is the import of the administrative law cases the State cites in its brief at pages 14, 15 and 16. The criminal court had no authority and no power to treat the suspension as a suspension on a third DUI and misstating the true record in its order was of no benefit to Mr. Sharpe. Any lawyer reading the cases cited by the State in its brief would know that and counsel his client accordingly. That is not what Mr. Bettman told his client, at least on the record before this Court, a record to which the State has stipulated.

CORE CONCERN

The State's response to the "core concern" doctrine argument is to argue that Mr. Sharpe did not argue that he was coerced or threatened into entering his plea and without that allegation and the proof of prejudice, that the trial court's failure to inquire

whether he was threatened or coerced is subject to harmless error review.

This is not a correct statement of the law. Counsel for Appellant Sharpe properly cited controlling federal case law for the "core concern" argument. The very nature of the core concern is that it is a matter as to which prejudice need not be shown - instead prejudice is presumed. That is what a core concern is, as contrasted to other matters under Rule 3.172 that are subject to harmless error review. The State cites no case that holds to the contrary. The two cases cited by the State deal with non-core concern issues and are inapposite.

CONCLUSION

Based on the foregoing arguments, Appellant Sharpe requests this Honorable Court vacate his conviction and sentence for DUI in Case Number 95-52909 MM.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to The Office of the State Attorney, Fourth Judicial Circuit, Attention Janet Allard Wilkerson, Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida, 32202, by United States mail, postage prepaid, this April 22nd, 2002.

_____
William Mallory Kent

APPENDIX

1. ***Whipple v. State***

2. ***Daniels v. State***

3. **Florida Statutes, § 322.28**