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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,640

FELIPE RUIZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

FILED

SID J. WHITE

JUL 9 1984

CLERK, SUPREME COURT.

By [Signature]
Chief Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON MERITS

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INTRODUCTION

Petitioner, Felipe Ruiz, was the defendant at the trial court level and the appellant in the District Court of Appeal of Florida, Third District. Respondent, the State of Florida, was the prosecution at the trial level and the appellee in the district court. The symbol "A" will refer to the Appendix to Petitioner's brief. The symbol "R" followed by a page number will constitute a page reference to the record on appeal and the symbol "T" will be used designate the transcript of the proceedings. The symbol "SR." shall designate the supplemental record on appeal. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as being a generally accurate account of the proceedings below, with such additions and exceptions as are set forth in the argument portion of this brief.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts as being a generally accurate account of the proceedings below, with such additions and exceptions as are set forth in the argument portion of this brief.

QUESTION PRESENTED

Respondent respectfully rephrases Petitioner's Question
Presented as follows:

WHETHER THE DISTRICT COURT OF APPEAL
CORRECTLY AFFIRMED THE TRIAL COURT'S
REVOCATION OF PETITIONER'S PROBATION?

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY
AFFIRMED THE TRIAL COURT'S REVOCATION
OF PETITIONER'S PROBATION. (RESTATED).

Petitioner contends that the district court of appeal erred in affirming the trial court's revocation of his probation where the revocation was based upon a certified copy of a conviction entered pursuant to a nolo contendere plea. He urges this Court to follow the reasoning of the Fifth District's plurality decision in Donaldson v. State, 407 So.2d 623 (Fla. 5th DCA 1981), wherein the Court held that a probation revocation cannot be predicated solely upon a conviction entered pursuant to a plea of nolo contendere.

Respondent submits that the Third District Court of Appeal reached the correct decision by rejecting Donaldson, supra, and following the reasoning of the First and Second Districts in Bradford v. State, 435 So.2d 962 (Fla. 1st DCA 1983) and Maselli v. State, 425 So.2d 176 (Fla. 2d DCA 1983).

In Maselli v. State, supra at 425 So.2d 177, the Court held that a conviction entered pursuant to a nolo contendere plea, standing alone, is sufficient to sustain a trial court's decision to revoke probation. The Maselli court stated the following reasoning in support of its conclusion:

It is well settled that the conviction of a crime is sufficient basis for a probation revocation. Franklin v. State, 356 So.2d 1352 (Fla. 2d DCA 1978); Demchak v. State, 351 So.2d 1053 (Fla. 4th DCA 1977); Ergantoff v. State, 208 So.2d 842 (Fla. 2d DCA 1968). The fact that the defendant may have pled nolo contendere does not detract from the legality of his conviction. Before a judge can accept a plea of nolo contendere, he must satisfy himself that the plea is voluntarily entered and that there is a factual basis for it. Fla.R.Crim.P. 3.172(a). There may be many reasons why a defendant chooses to enter a plea of nolo contendere, but if a judgment of guilt is entered upon the plea we must assume that the conviction is valid unless it has been set aside...

425 So.2d 176-177.

This rationale is consistent with the reasons espoused by Judge Cobb in his dissent to Donaldson, supra. As Judge Cobb noted in his dissent to Donaldson, supra at 407 So.2d 625, the Courts should not assume that a trial judge in an earlier case failed to perform his procedural duty. To require trial judges look behind a facially valid judgment, as Donaldson would have one do, would result in judges on the same level of the court system speculatively interfering with judgments of other judges of equal stature.

In this case, when Petitioner entered a nolo contendere plea in Orange County he was on notice of the terms of his probation stemming from his prior Dade County case. The conditions of his probation clearly required him to remain at liberty without violating any law and put him on notice that

a formal conviction would not be necessary in order to allow for revocation of his probation (R. 32-32A). Thus, he knew or should have known the ramifications of his subsequent violation of the law and the consequences which could have and did in fact follow at the time of the entry of his plea.

If Petitioner can demonstrate that he was not aware of the ramifications of his plea, then his remedy is to seek to withdraw his nolo contendere plea pursuant to a motion for post-conviction relief filed under Rule 3.850, Florida Rules of Criminal Procedure. Until and unless the prior conviction is invalidated, the court's judgment should be given full force of law.

In Bradford v. State, supra, the First District accepted the reasoning of the Second District in Maselli, supra, and noted that it interpreted Maselli as holding that evidence of such conviction (entered pursuant to a nolo contendere plea) is legally sufficient to establish a violation of probation. The Bradford Court did, however, go on to add that a defendant must nevertheless be given a fair opportunity to respond with evidence of mitigating circumstances suggesting that such conviction does not warrant revocation. Should this Court accept this position, Respondent submits that Petitioner was given fair opportunity to present such evidence at the hearing in the case at bar, yet failed to do so. (T. 1-21). Thus, the evidence of Petitioner's conviction should be considered as legally sufficient evidence to sustain the revocation of his probation.

Although to the best of counsel for Respondent's knowledge, this Court has not squarely addressed the instant issue, this Court did address an analogous issue in Stevens v. State, 409 So.2d 1051 (Fla. 1982), a case cited to the trial court by the prosecutor. In Stevens, supra, this Court upheld a revocation of probation based solely on a certified copy of a judgment of conviction obtained by entry of a plea of nolo contendere. In holding that a judgment of conviction which is on appeal may serve as the basis for revocation of probation, the Court noted that a formal conviction of a crime is not essential and that a conviction is presumed to be correct, unless reversed. The Court did not look to the basis of the conviction in reaching its decision. Thus, Stevens is implicitly in accord with the language in Maselli to the effect that a conviction should be presumed valid unless it has been set aside and can therefore be used as a basis for revoking a defendant's probation.

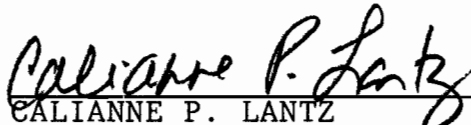
Respondent therefore urges this Court to affirm the Third District Court of Appeal's decision in the instant case and adopt the holding of Maselli and rationale to the effect that although there may be many reasons why a defendant chooses to enter a plea of nolo contendere, if a judgment of guilt is entered upon the plea, it should be assumed that the conviction is valid unless it has been set aside. The trial court's revocation of Petitioner's probation should therefore be upheld.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Respondent respectfully submits that the judgment and sentence imposed by the trial court and the decision of the district court of appeal should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General

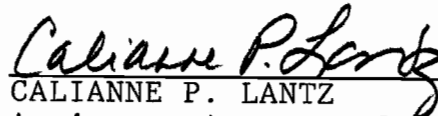


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to BETH C. WEITZNER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 6th day of July, 1984.



CALIANNE P. LANTZ
Assistant Attorney General

/sah