OA 5-6-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,283

STATE OF FLORIDA,

Petitioner,

vs.

LAZARO GINEBRA,

Respondent,

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and Respondent, Lazaro Ginebra, was the defendant. The parties will be referred to as they stood before the trial court. All emphasis is supplied unless the contrary is indicated. The Appendix to the State's jurisdictional brief, which contains seven exhibits, will be referred to as A.1, A.2, etc. A copy of the jurisdictional brief and its appendix will be mailed to the Public Defender's Office of the Second Judicial Circuit in and for Leon County, contemporaneously with this brief, in order to assist them in the preparation of their answer brief on the merits.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by information in four separate cases as follows:

A) Case No. 80-23755-A: Grand Theft.

B) Case No. 81-994: Count I - Armed Robbery, Count II - Possession of a Firearm while Engaged in a Criminal Offense.

C) Case No. 83-12589: Count I - Attempted Second Degree Murder, Count II - Armed Robbery, Count III - Possession of a Firearm While Engaged in a Criminal Offense.

D) Case No. 83-8064-A: Carrying a Concealed Firearm.

On August 22, 1983 the Defendant pleaded guilty to all of the above charges, was adjudicated guilty on each charge, and was sentenced to five years each in case A and, twenty-five years with a three year minimum mandatory in cases B and C, respectively, with all of the sentences to run concurrent with each other.

On June 2, 1986 the Defendant filed a motion in the trial court for post conviction relief pursuant to Fla.R.Crim.P. 3.850. (A. 1) The basis for the Defendant's attack on his judgment and sentence was that his plea was not knowingly and intelligently made, in that his attorney failed to advise him that as a result of his convictions he would be subject to deportation under Federal Immigration laws. The Defendant relied on the decisions of the Third District in Martinez v. State, 475 So.2d 1292 (Fla. 3d DCA 1985), and Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), wherein the Third District held that failure to advise an alien defendant of the possibility of deportation as a result of his conviction constituted ineffective assistance of counsel as a matter of law, and therefore rendered the guilty plea involuntary. The Third District further held that when an alien defendant raises the above issue in a 3.850 motion, he is automatically entitled to an evidentiary hearing to

determine whether his attorney did in fact fail to advise him of the deportation consequences, and whether he will in fact be deported as a result of his convictions. Copies of the Third District's opinion in Martinez and Edwards, supra, are attached. (A. 2 and A. 3).

On June 16, 1986 the trial court entered an order summarily denying the Defendant's 3.850 motion, (A. 4), and the Defendant appealed. The Third District entered an order July 22, 1986 directing the State to show cause why the relief sought by the Defendant should not be granted (A. 5). On August 11, 1986 the State filed its Response, urging the Third District to reconsider its prior opinions in Martinez and Edwards, or to at least modify these holdings to require that the defendant specifically allege in his 3.850 motion that he is in the process of actually being deported. (A. 6).

On August 26, 1986 the Third District rendered its opinion, (A. 7), which reversed the trial court's summary denial of the Defendant's 3.850 motion, and remanded for an evidentiary hearing in compliance with its prior decisions in Martinez and Edwards. The State then sought discretionary review with this Court, and on January 5th, 1987 the Court issued an order accepting jurisdiction and appointing the Leon County Public Defender as attorney for the defendant.

STATEMENT OF THE ISSUE

WHETHER TRIAL COUNSEL'S FAILURE TO ADVISE AN ALIEN DEFENDANT OF THE COLLATERAL CONSEQUENCE OF POSSIBLE DEPORTATION PRIOR TO THE DEFENDANT'S GUILTY PLEA, RENDERS COUNSEL'S ASSISTANCE INEFFECTIVE.

SUMMARY OF THE ARGUMENT

Prior to Edwards, supra, it was well established that a defendant must be advised of the direct consequences of his plea, i.e., loss of right to jury trial, to confront witnesses, to direct appeal, length of sentence, etc., but that no such requirement existed as to collateral consequences, i.e., right to vote, hold office, possess firearms, loss of certain employment opportunities, and as in the present case, the possibility of deportation for alien defendants convicted of felonies. In Edwards the Third District rejected an unbroken line of Federal authority and carved out an exception to the above rule. It held in essence that deportation was such a severe collateral consequence that it needed special treatment. Although admitting that it would be inappropriate to require the trial court to advise defendant's of this possible consequence, the court did not hesistate to place this burden upon counsel, and in such a manner that failure to do so undermined the constitutionality of a subsequent guilty plea regardless of the strength of the State's case or any other factors.

As in all ineffective assistance cases the starting point is Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which not incidently was decided three years after Edwards. Both prongs of Strickland, deficiency and prejudice, will be dealt with in detail. The

Federal decisions have focused on both as reasons to reject the rationale of Edwards. The earlier Federal cases, as well as the dissent of then chief judge Hubbart in Edwards, rest on the premise that however laudable a practice, advisement of deportation consequences is not constitutionally required. The most recent Federal case, the Eleventh Circuit's opinion in United States v. Campbell, 778 F.2d 764 (1985), expressly rejects Edward's by stressing its lack of prejudice analysis. The object of the present argument is to demonstrate that under either wing of Strickland, the Third District's experiment in Edwards simply does not fly.

ARGUMENT

TRIAL COUNSEL'S FAILURE TO ADVISE AN ALIEN DEFENDANT OF THE COLLATERAL CONSEQUENCE OF POSSIBLE DEPORTATION PRIOR TO PLEADING GUILTY, DOES NOT RENDER COUNSEL'S ASSISTANCE CONSTITUTIONALLY DEFICIENT.

It must be assumed that at an evidentiary hearing the Defendant would have established the allegations of his Rule 3.850 motion: that he is a nonenglish speaking resident alien, that counsel knew or should have known the Defendant was an alien, and that counsel did not inform him that under Federal Law, a state felony conviction is grounds for deportation. [1]

It is equally important however, to note what the Defendant has not alleged: that he was misled as to the deportation consequences, that he was inadequately apprised of the charges, evidence and possible penalties, and most especially, that he was innocent of the charges or that the State had insufficient evidence to convict him at trial. The significance of these missing allegations will shortly unfold.

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[1] Should the State's argument fail to presuade the Court, and an evidentiary hearing become necessary, the State would respectfully reserve the right to dispute the above allegations.

Since Edwards both the First and Fourth Districts have issued brief opinions on this issue, the former rejecting [2] and the latter adopting [3] its holding. The Third District has followed Edwards in Martinez v. State, 475 So.2d 1292 (Fla. 3d DCA 1985) and the instant case [4], although in Martinez chief judge Schwartz entered a special concurrence in which he expressed disagreement with Edwards, citing Hahn (citation below) and Government of Virgin Island v. Pamphile, 604 F.Supp. 753 (D.V.I 1985), the latter case being perhaps the most exhaustive treatment of the issue to date. None of the Florida cases following Edwards offers much in the way of analysis, the First District in Hahn flatly rejecting the affirmative duty imposed by Edwards as unwarranted, while the Fourth District in Rodriguez (citation below) has embraced Edwards with equal brevity.

Before approaching the Third District's reasoning in Edwards, it is but proper to step back and examine the thirty year history of this issue in the Federal court's, a history which the Third District gave rather selective treatment at best.

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[2] Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982).

[3] Rodriguez v. State, 487 So.2d 1224 (Fla. 4th DCA 1986).

[4] Ginebra v. State, 11 F.L.W. 1860, (Fla. 3d DCA 1986).

In United States v. Parrino, 212 F.2d 919 (2nd Cir.) cert denied 348 U.S. 840, 75 S.Ct. 46, 99 L.Ed.2d 663 (1954), the Second Circuit addressed this novel issue and soundly rejected the Defendant's claim:

> Moreover, here the subject matter of the claimed surprise was not the severity of the sentence directly flowing from the judgment but a collateral consequence thereof, namely deportability . . . . We think it plainly unsound to hold, as now in principle we are urged to hold, that such defendants are subjected to manifest injustice, if held to their plea, merely because they did not understand or foresee such collateral consequences.
>
> (Id. 921, 922)

In Parrino, supra the Court was not swayed by the Defendant's allegation that counsel gave erroneous advice concerning deportation consequences, however the Second Circuit subsequently tempered this holding in United States v. Santelises, 509 F.2d 703 (2nd Cir. 1975), wherein it held that affirmative misrepresentation by counsel might be sufficient to warrant relief.

In United States v. Shapiro, 222 F.2d 836 (7th Cir. 1955) the Seventh Circuit granted relief where the Defendant had a bonafide belief that he was a United States citizen, however the Court did not even infer that counsel has the affirmative duty espoused in Edwards. Rather the Court held

only that the Defendant's bonafide mistake of fact (as opposed to ignorance of a particular law) created a manifest injustice under the facts of that case.

In United States v. Briscoe, 432 F.2d 1351 (D.C. Cir. 1970) and United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971) the Court rejected the Defendant's Edwards claim, relying not only on Parrino, supra, but also on Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), in which the Supreme Court had stated:

> "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admisssion in open court that he committed the acts charged in the indictment."
>
> (Id at 397 U.S. 748, 90 S.Ct. 1468)

The Supreme Court stated further that:

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.
>
> (Id at 757, 1473)

The importance of these cases is that they recognize what will become a critical factor under the second prong of

Strickland: that the Defendant is not repudiating his confession of guilt or challenging the sufficiency of the State's case.

In Vizcarra-Delgaldillo v. United States, 395 F.2d 70 (9th Cir. 1968) the Ninth Circuit had rejected an Edwards type claim, and in United States v. Russell, 686 F.2d 35 (D. C. Cir. 1982) the Court reaffirmed its earlier holding in Briscoe, supra, that whereas misrepresentation may be grounds for relief, total ignorance may not.

The Fifth Circuit followed Parrino and its progency in United States v. Gavilan, 761 F.2d 226 (5th Cir. 1985), and in United States v. Downs-Morgan, 765 F.2d 1534 (11th Cir. 1985), the Eleventh Circuit followed suit. Just prior to these decisions the District Court of the Virgin Islands issued its exhaustive opinion in Government of the Virgin Island v. Pamphile, 604 F.Supp. 753 (D. V. I. 1985), which chief judge Schwartz of the Third District cited with approval in his special concurrence in Martinez, supra.

In United States v. Campbell, 778 F.2d 764 (11th Cir. 1985), the Eleventh Circuit opened a new chapter by injecting the formula of Strickland v. Washington into the Edwards equation. Prior to Campbell, the Federal Courts had held that counsel was not constitutionally deficient for failing to advise of deportation consequences; notwithstanding its

desirability, it simply wasn't required. In Campbell the Court phrased the issue as follows:

> In order to prevail on the ineffective assistance of counsel claim, Campbell must demonstrate (1) that her trial counsel's conduct was unreasonable, and (2) that but for her trial counsel's failure to apprise her of the deportation consequences of the guilty plea, the result of the plea proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see Downs-Morgan, 765 F.2d at 1538-42; Gavilan, 761 F.2d at 228-29. Campbell alleges that she would not have pleaded guilty if her trial counsel had advised her of the deportation consequences of the plea.[5] This bare allegation is not sufficient, however, to establish perjudice under Strickland.
>
> (Id. at 768)

Thus the Court aimed its analysis squarely at the second pronge of Strickland, prejudice. The Court then expressly rejected the Defendant's invitation to follow Edwards, and instead cited with approval the dissent of then chief judge Hubbard. The Court went on to conclude that all the ingredients of a free and voluntary plea were present, and that no prejudice under Strickland had been established. Central to this finding of no prejudice, though only touched upon by the Court, is the Defendant's failure to repudiate his admitted guilt or challenge the likelihood of his conviction at trial. This failure is of supreme import since

if convicted at trial the Defendant would be deportable in any event.

And finally, Edwards. The essence of the majority's rationale can be distilled from the following single passage:

> But labelling the consequences as collateral does not diminish its significance. Indeed, the penalty of deportation has been recognized as often far more extreme than the direct consequences which may flow from a plea of guilty to an offense. Deportation has been said to be "the equivalent of banishment," Fong Haw Tan v. Phelan, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433 (1947); "a savage penalty," "a life sentence of exile," Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951) (Jackson, J., dissenting); an event that results in "loss of property or life; or of all that makes life worthwhile." Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed.2d 938 (1922).
>
> (Id. at 598)

It is unnecessary to agree or disagree with the above quoted verse to understand that, applied here, they serve to conceal an important truth, one not lost upon the dissent. We deal here with a defendant who has admitted to committing serious crimes [5] against those who have opened their arms to him and would call him brother. There is no right to be

[5] In this case, very serious crimes.

admitted to this greatest of lands, rather it is a special priviledge to which millions aspire. It is not reasonable, as the dissent states, that such invitees should be held to the knowledge that should they turn upon their hosts, the latter might cancel their precious invitations? We are after all not speaking of dropping these admitted criminals in the ocean, but rather of returning them to their former homes.

If the above discourse seems overdone it is only to demonstrate that the emotion here cuts both ways. As for legal analysis, the majority's position is plain: in spite of the longstanding general rule regarding collateral consequences, the possibility of deportation is of such unique nature that an exception to the general rule is mandated. The following excerpt from the majority opinion is enlightening:

> This brings us to the dissenter's comment that it must be obvious to any alien defendant that deportation is a possible consequence, and therefore, advice to that effect is, as a matter of law, unnecessary. We think it could as well be said that it must be obvious to every American citizen that he has a right to plead not guilty and maintain his innocence, that he has a right to trial by jury, a right to confront witnesses against him -- and yet our rules require, see, e.g., Florida Rule of Criminal Procedure 3.172, that these and other equally fundamental rights be diligently explained to every defendant before a plea of guilty waiving such rights is accepted.

> We simply do not indulge assumptions that even the most basic rights are known or understood, see, e.g., Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)
>
> (Id at 599, 600)

The above paragraph is a perfect example of using one's conclusion as proof of one's conclusion. The Court reasons that because we fully explain all the fundamental rights (direct consequences) to a defendant, we should therefore make sure he understands the deportation consequences (a collateral consequence). The Court is really just restating its conclusion, that deportation consequences, although collateral, deserve special treatment.

It is interesting that the Court declines to reclassify deportation as a direct consequence. It elects not to require the trial court to inform the Defendant of this consequence, which would in effect reclassify it as a direct consequence. Instead the responsibility must lie with counsel. As noted by the dissent this creates more problems that it solves. Whereas the trial court could settle the matter with a few words in the plea colloquy, leaving this supposedly critical discussion to counsel opens up an "escape hatch" for every alien who subsequently, sometimes years later, becomes dissatisfied with his plea. The Court's

inability to push its reasoning to its logical conclusion underscores the weakness in its logic position.

The above discussion should not be read as a rejection of the aim of Edwards, but merely of the means employed to achieve that aim. Lawyers should be educated and encouraged to discuss the deportation consequences of felony convictions with their clients, as well as the other serious collateral consequences attendant thereon. This is especially true where a plea is contemplated. However there is no sound reason in logic or law why an otherwise voluntary and trustworthy plea should be disturbed simpy because the Defendant's understand-ing of a particular collateral consequence , however severe, was not all it could of been.

CONCLUSION

The District Court's order which reversed the trial court's summary denial of the Defendant's Rule 3.850 motion was erroneous, and should therefore be reversed.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON JURISDICTION** was furnished by mail to **MICHAEL E. ALLEN** The Public Defender of the Second Judicial Circuit, P.O. Box 671, Barnett Bank Building, Tallahassee, Florida 33302 on this 30 th day of January, 1987.

RALPH BARREIRA
Assistant Attorney General

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