OA 5-6-87

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO: 69,283

LAZARO GINEBRA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
P. O. BOX 671
TALLAHASSEE, FLORIDA 32304
904/488-2458

ATTORNEY FOR RESPONDENT

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BRIEF OF RESPONDENT ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The respondent accepts petitioner's recitation of the case and facts as set forth in petitioner's Brief on the Merits.

STATEMENT OF THE ISSUE

WHETHER AN ALIEN/MOVANT UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 STATES A COLORABLE CLAIM FOR POST-CONVICTION RELIEF WHEN HE ALLEGES THAT HE PLED GUILTY TO A CRIME WITHOUT BEING PREVIOUSLY ADVISED BY HIS COUNSEL AS TO THE POTENTIAL DEPORTATION CONSEQUENCES OF SUCH PLEA.

SUMMARY OF ARGUMENT

In Edwards v. State, 393 So.2d 597 (Fla. 3d DCA), review denied, 402 So.2d 613 (Fla. 1981), the Third District Court of Appeal held that an alien who asserts in a motion pursuant to Florida Rule of Criminal Procedure 3.850 that he has pled guilty to a criminal offense without being advised by his counsel that such plea may subject him to deportation proceedings states a colorable claim for post conviction relief and will generally be entitled to an evidentiary hearing. In order to prevail at such evidentiary hearing the alien/movant must prove (1) that his counsel's performance fell below the standard for reasonably effective assistance of counsel; (2) that he was not advised by his counsel and was otherwise unaware that a potential consequence of his plea would be deportation; (3) that had he known of this consequence, he would not have entered his plea; and (4) that such consequence will actually flow from the conviction.

The holding in Edwards is completely consistent with the holding of the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984) in that Edwards requires proof of both deficient performance by counsel and prejudice to the extent that the outcome of the proceedings were thereby altered.

The Third District's holding in Edwards should not be overruled because of its failure to require alien/movants to set forth every element of proof in their motions since such requirement would have the effect of denying non-legally educated,

often illiterate, sometimes non-English speaking, indigent prisoners access to post-conviction relief.

The fact that deportation has generally been recognized as a "collateral" result of conviction of an alien defendant is logically irrelevant to the issue of whether the Strickland and/or Edwards test can be satisfied where an alien defendant has pled guilty to a crime without being advised by his counsel of the potential deportation consequences.

Courts in several other jurisdictions have issued opinions in accord with Edwards.

Edwards should be approved by this Court and, since respondent's success below was upon authority of Edwards, the Third District's opinion in Ginebra v. State, 11 F.L.W. 1860 (Fla. 3d DCA 1986), should be affirmed.

ARGUMENT

ISSUE PRESENTED

WHETHER AN ALIEN/MOVANT UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 STATES A COLORABLE CLAIM FOR POST-CONVICTION RELIEF WHEN HE ALLEGES THAT HE PLED GUILTY TO A CRIME WITHOUT BEING PREVIOUSLY ADVISED BY HIS COUNSEL AS TO THE POTENTIAL DEPORTATION CONSEQUENCES OF SUCH PLEA.

Lazaro Ginebra filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 after having pled guilty to various criminal offenses. Ginebra, a Mariel refugee, claimed his attorney failed to inform him, prior to entering his pleas, that guilty pleas might result in deportation proceedings against him. He contended that his counsel's failure to so advise him amounted to ineffective assistance of counsel and caused his pleas to be involuntary. The trial court summarily denied his motion but the Third District Court of Appeal reversed in an opinion reported at 11 F.L.W. 1860, and remanded the case to the Circuit Court of Dade County for further proceedings in accordance with the earlier holding of the Third District in Edwards v. State, 393 So.2d 597 (Fla. 3d DCA), review denied, 402 So.2d 613 (Fla. 1981).[1] This Court has granted review based upon conflict with the First District Court of Appeal opinion in Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982).

In Edwards the Third District held that an assertion by an alien that he has pled guilty to a criminal offense without being advised by his counsel that such plea may subject him to

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1. Edwards has been followed in Martinez v. State, 475 So.2d 1292 (Fla. 3d DCA 1985); Rodriguez v. State, 487 So.2d 1224 (Fla. 4th DCA 1986); and Ginebra v. State, 11 F.L.W. 1860 (Fla. 3d DCA 1986).

deportation proceedings states a colorable claim for post-conviction relief. The Edwards court did not hold that making such an assertion automatically entitles an alien so situated to relief, nor did the court hold that simple proof of the bare essentials of the allegations would entitle the movant to relief. The court merely held that when such assertions are made the trial court is without authority to summarily deny the motion.

When faced with an Edwards type claim a trial court should follow the procedure delineated in Florida Rule of Criminal Procedure 3.850. This will generally mean, unless the files and records in the case conclusively show the movant is not entitled to relief,[2] an evidentiary hearing should be held.

The Edwards opinion clearly sets forth several elements which must be proved at the evidentiary hearing before the movant will be entitled to relief. The movant must prove (1) that his counsel's performance fell below the standard for reasonably effective assistance of counsel; (2) that the movant was not advised by his counsel and was otherwise unaware that a potential consequence of his plea would be deportation; (3) that

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[2] In Ginebra the Third District alluded to the fact that an evidentiary hearing on an Edwards type claim would be unnecessary where the files and records in the case conclusively show that the movant is not entitled to relief. See Ginebra at pages 1860-1861, citing Owens v. State, 463 So.2d 408 (Fla. 3d DCA 1985). Also see Martinez, supra at page 1293.

had he known of this consequence, he would not have entered his plea; and (4) that such consequence will actually flow from the conviction. Only after proof of each of these elements will a movant be entitled to relief under the Third District's holding. See Edwards at page 600.[3]

Petitioner's brief herein suggests that the Edwards opinion is inconsistent with the more recent holding of the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984),[4] wherein the Supreme Court set forth two elements which must be proved in order for a movant to be constitutionally entitled to relief from a conviction because of ineffective assistance of counsel. But examination of the Third District's opinion in Edwards clearly reveals that it is completely consistent with Strickland. The Supreme Court held in Strickland that a movant would be entitled to post-conviction relief because of ineffective assistance of counsel only when he proved (1) that his counsel's representation fell below the standard of reasonably effective assistance of counsel and (2) that but for his counsel's unprofessional errors, the result of the proceeding would have been different. When these elements of required proof are compared with the elements of required proof set forth in the preceding paragraph it can be readily seen that there is no substantial difference

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[3]To like effect see Martinez, supra, at page 1293.

[4]Adopted and followed by this Court in Downs v. State, 453 So.2d 1102 (Fla. 1984); and State v. Bucherie, 468 So.2d 229 (Fla. 1985).

between the two. The first element of Strickland is identical with the first Edwards element set forth above, and the second Strickland element is fully covered by elements 2-4 of the Edwards holding as outlined above.

Petitioner also seems to suggest that the Edwards opinion is somehow deficient because it does not require the movant to set forth each element of required proof in his motion. If indigent prisoners seeking post-conviction relief were entitled to assistance of counsel at the motion preparation stage, the petitioner's suggestion might be well taken, but such is not the case. This Court and the Florida Legislature have not seen fit to provide appointed counsel at the motion preparation stage, and sometimes not even at the evidentiary hearing stage of post-conviction proceedings.[5] Rather this Court has promulgated a form, Florida Rule of Criminal Procedure 3.987, to be used by prisoners in moving for post-conviction relief. Few of the prisoners in the Florida prison system are legally educated. Many are illiterate or semi-literate. Many others, like Lazaro Ginebra, are not even conversant in English.[6] Petitioner's suggestion that such prisoners should be required to take the form set forth in Florida Rule of Criminal Procedure 3.987 and fully set forth all elements of legal proof required by Edwards, or even Strickland, before they will be entitled to be heard, is tantamount to a suggestion that Florida's indigent prisoners should

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[5] Graham v. State, 372 So.2d 1363 (Fla. 1979); and Williams v. State, 472 So.2d 738 (Fla. 1985).

[6] See page four of Ginebra's Post Conviction Relief Motion.

be denied access to the courts of this state in petitioning for post-conviction relief. Such suggestion should not be countenanced by this Court. And to the extent that Hahn, supra, supports petitioner's position on this point, it should be overruled by this Court.

Petitioner argues that this Court should hold that a trial counsel's failure to advise his alien client of potential deportation consequences of pleading guilty can never amount to ineffective assistance of counsel. Petitioner reasons that this Court should so hold because deportation is a "collateral" consequence of an alien defendant's plea. For this proposition petitioner purportedly cites "an unbroken line of federal authority"[7] in support of its position. But a careful examination of the cases cited by petitioner reveals that even the federal courts have waivered on this issue. For example, while United States v. Parrino, 212 F.2d 919 (2nd Cir.), cert. denied, 348 U.S. 840, 75 S.Ct. 46, 99 L.Ed. 663 (1954), appears to support petitioner's argument, the dissent written therein by Judge Frank has been as often cited with approval by the federal courts.[8] United States v. Santelisis, 509 F.2d 703 (2nd Cir. 1975); United States v. Shapiro, 222 F.2d 836 (7th Cir. 1955); and United States v. Briscoe, 432 F.2d 1351 (D.C. Cir. 1970), all carve out exceptions to the rule in Parrino. The opinion in United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982), even

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[7] Page 5 of petitioner's brief.

[8] United States v. Briscoe, 432 F.2d 1351 (D.C. Cir. 1970); and see 8A J. Moore, Federal Practice, Section 32.07[3] at 32-80 (Cipes ed. 1969), where Professor Moore states that "the vigorous dissent of Judge Frank more likely reflects the present attitude of the federal judiciary."

expresses reservations regarding the classification of deportation as a collateral, rather than direct, consequence of an alien pleading guilty to a crime.

As a practical matter the issue of whether deportation is a direct or collateral effect of an alien's plea is irrelevant to the issue before the Court when a post-conviction motion alleging ineffective assistance of counsel is presented. Simply stated, the issues are whether the counsel's performance was below the standard of reasonably effective counsel, i.e. would reasonably effective counsel have acted otherwise, and whether the counsel's deficiency altered the outcome of the proceedings. These are the relevant issues according to Strickland, and whether the deficient advise related to a "direct" or "collateral" issue is beside the point.

Petitioner seems to imply that the Third District's holdings in Edwards and Ginebra are mere aberrations in the law, and that no other jurisdictions have recognized that like-situated prisoners should be entitled to be heard. Such is not the case. People v. Giron, 11 Cal.3d 793, 114 Cal. Rptr. 596, 523 P.2d 636 (1974); People v. Wiedersberg, 44 Cal. App.3d 550, 118 Cal. Rptr. 755 (1st Cal. App. 1975); Commonwealth v. Wellington, 451 A.2d 223 (Pa. Super. 1982); and People v. Correa, 465 N.E.2d 507 (Ill. App. 1 Dist. 1984), are examples of opinions from other jurisdictions which are in accord with the holdings in Edwards and Ginebra.

CONCLUSION

Upon the arguments and authorities set forth herein the Third District's opinion in Ginebra v. State, 11 F.L.W. 1860 (Fla. 3d DCA 1986), should be affirmed.

Respectfully submitted,

MICHAEL E. ALLEN
Public Defender
Second Judicial Circuit
P.O. Box 671
Tallahassee, Florida 32302
904/488-2458

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondent on the Merits has been furnished to Ralph Barreira, Assistant Attorney General, Florida Regional Service Center, Ruth Bryan Owens Rhode Building, 401 N.W. 2nd Avenue (Suite 820), Miami, Florida 33128, and to Lazaro Ginebra, Avon Park Correctional Institution, No. 091096, P. O. Box 1100-1354, Avon Park, Florida 33825, this 23 day of February, 1987.

MICHAEL E. ALLEN