

042

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,150

THE STATE OF FLORIDA,
Petitioner,

vs.

GERARDO FUNDORA,
Respondent.

CLERK OF THE SUPREME COURT
JAMES G. ...
Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF CASE AND FACTS

Gerardo Fundora, subsequent to convictions, filed a motion for post-conviction relief, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, alleging that his counsel was ineffective in failing to inform him of the possibility of deportation as a result of his guilty pleas, and that his guilty pleas were therefore involuntary. (App. 1). The trial court summarily denied the motion, without an evidentiary hearing. (App. 1). The Third District Court of Appeal held that the allegations of the motion were sufficient so that, if proven, would entitle Fundora to relief. (App. 1). Holding that the trial court failed to attach those portions of the record which would demonstrate that Fundora is not entitled to relief, the Third District Court of Appeal reversed and remanded for further proceedings. (App. 1).

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, IS IN CONFLICT WITH THE PRIOR DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN STATE v. HAHN, 421 So.2d 710 (FLA. 1st DCA 1982).

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal in the instant case directly and expressly conflicts with the decision of the First District Court of Appeal in the case of State v. Hahn, 421 So.2d 710 (Fla. 1st DCA 1982), on the issue of whether counsel's failure to advise a defendant of the possibility of deportation can render a guilty plea involuntary. This Court has accepted this issue for review in State v. Ginebra, Case No. 69,283. This Court should similarly exercise its discretion to accept jurisdiction in the instant case,

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF
APPEAL IS IN CONFLICT WITH THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL
IN STATE v. HAHN, 421 So.2d 710 (FLA.
1st DCA 1982).

The First and Third District Courts of Appeal have reached opposite conclusions on the issue of whether the failure of counsel to advise a defendant of the possible consequences of deportation, as a result of a guilty plea, constitutes ineffective assistance of counsel for the purpose of rendering the guilty plea involuntary. In the instant case, the Third District, relying on its prior decisions in Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), and Ginebra v. State, 490 So.2d 467 (Fla. 3d DCA 1986), held that allegations of counsel's failure to advise of the possibility of deportation, entitled the defendant to an evidentiary hearing, and, if proven, would entitle the defendant to have the plea set aside.

The First District, in State v. Hahn, 421 So.2d 710 (Fla. 1st DCA 1982), rejected the conclusion of Edwards and

held that the failure of counsel to advise of the possibility of deportation did not constitute ineffective assistance and did not render the plea involuntary. The First District concluded, "[w]e acknowledge conflict with Edwards."

The instant case merely reiterates the holding of Edwards. The Third District itself has been highly divided over this issue. Judge Hubbard wrote a vigorous dissent in Edwards, and Judge Schwartz, in a specially concurring opinion in Martinez v. State, 475 So.2d 1292, 1293 (Fla. 3d DCA 1985), noted his disagreement with Edwards, but followed it because of its binding authority.

Finally, the Third District's opinion on this issue in Ginebra, supra, has been accepted for review by this Court, on the basis of the conflict with Hahn. State v. Ginebra, Case No. 69,283.

As the opinion in the instant case expressly and directly conflicts with Hahn, and as this Court has accepted Ginebra for review of this issue, the Court should exercise its discretion to accept jurisdiction.

CONCLUSION

The decision of the Third District Court of Appeal expressly and directly conflicts with a decision of the First District Court of Appeal. This Court has already accepted jurisdiction of the same issue in State v. Ginebra, Case No. 69,283. Petitioner has established the necessary jurisdiction of this Court and urges this Court to accept jurisdiction.

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 Gerardo Fundora, #100022, Polk Correctional Institution, 3876 Evans Road, Box 50, Polk City, Florida 33868, on this 27th day of February, 1987.



RICHARD L. POLIN
Assistant Attorney General

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