

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,522

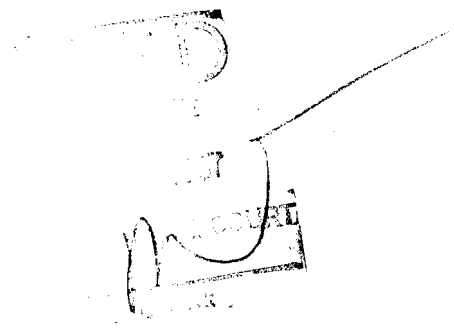
THE STATE OF FLORIDA,

Petitioner,

vs.

HECTOR SALLATO,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

BRIEF OF PETITIONER ON MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the Appellant in the Third District Court of Appeal of Florida and the prosecution in the trial court. The Respondent, Hector Sallato, was the Appellee in the Third District Court of Appeal and the Defendant in the trial court. The parties will be referred to as they stand before this Court. The symbol "R" will be used to designate the Record on Appeal and the symbol "TR" will be used to designate the transcript of the lower court proceedings.¹ The symbol "SR" will be used to designate the supplemental record consisting of the transcript of April 19, 1982. The Appendix to this brief contains a conformed copy of the opinion of the Third District Court of Appeal sought to be reviewed. All emphasis is supplied unless the contrary is indicated.

¹The original record is due to be filed with this Court by the Clerk of the Third District Court of Appeal on or before September 14, 1987.

STATEMENT OF THE CASE AND FACTS

Respondent, Hector Sallato, is a citizen of Chile, South America (R.2). He is not, nor has he ever been, a United States citizen or person lawfully admitted for permanent residence in the United States (R.2). On January 7, 1982, an information was filed charging Respondent with Attempted Burglary of a Structure (R.1). On April 19, 1982, Respondent appeared before the trial court and pled guilty as charged in the information (SR.3-4). The trial court placed Respondent on eighteen (18) months probation and an adjudication of guilt was withheld (R.6; SR.5).

Several years later, on March 25, 1986, Respondent filed a motion to vacate his guilty plea on the basis that he was not advised by counsel of the consequences of his plea relative to his ability to become a permanent resident in the United States (R.4). On April 11, 1986, a hearing was held on Respondent's motion (TR.1-22). On April 30, 1986, the trial court entered an order vacating Respondent's plea (R.7).

On May 13, 1986, Petitioner timely filed its Notice of Appeal and this case was ultimately affirmed by the Third District Court of Appeal on April 21, 1987 (Appendix).

In its opinion, the Third District Court of Appeal relied upon its prior opinions in Edwards v. State, 393 So.2d 597 (Fla. 3d DCA 1981), Ginebra v. State, 498 So.2d 467 (Fla. 3d DCA 1986)², and Martinez v. State, 475 So.2d 1292 (Fla. 3d DCA 1985). The Third District Court of Appeal also cited to Rodriguez v. State, 487 So.2d 1224 (Fla. 4th DCA 1986) as authority for its decision, but acknowledged that its decision, as well as the above-referenced authorities, are in conflict with Hahn v. State, 421 So.2d 710 (Fla. 1st DCA 1982)(Appendix).

Petitioner subsequently sought discretionary review of this case based upon its conflict with Hahn. On July 23, 1987, this Court entered an order accepting jurisdiction and dispensing with oral argument in the instant case.

²Most recently, in State v. Ginebra, 12 F.L.W. 322,323 (Fla. July 2, 1987), this Court expressly disapproved Edwards and held that "counsel's failure to advise his client of the collateral consequence of deportation does not constitute ineffective assistance of counsel."

ISSUE ON APPEAL

WHETHER TRIAL COUNSEL'S FAILURE TO ADVISE
THE ALIEN RESPONDENT OF THE COLLATERAL
CONSEQUENCE OF DEPORTATION RENDERED
THE RESPONDENT'S GUILTY PLEA INVOLUNTARY?

SUMMARY OF THE ARGUMENT

The issue involved in this case was recently resolved by this Court in State v. Ginebra, 12 F.L.W. 322 (Fla. July 2, 1987). In Ginebra, this Court held that trial counsel is not constitutionally required to advise an alien defendant of the collateral consequence of possible deportation which may result from a guilty plea. Thus, the decision of Third District Court of Appeal below, which relies upon caselaw contrary to this holding, should be reversed.

ARGUMENT

TRIAL COUNSEL'S FAILURE TO ADVISE THE ALIEN RESPONDENT THAT HIS GUILTY PLEA MIGHT SUBJECT HIM TO THE COLLATERAL CONSEQUENCE OF DEPORTATION DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.


This Court recently held in State v. Ginebra, 12 F.L.W. 322 (Fla. July 2, 1987) that "for counsel to provide the reasonably effective assistance mandated by the Constitution, he need advise his client of only the direct consequences of a guilty plea." This Court further held that "counsel's failure to advise his client of the collateral consequence of deportation does not constitute ineffective assistance of counsel" Id. at 323. In the instant case, Respondent alleged in his Motion to Vacate Plea that he had "not been advised of the immigration consequences of his plea" (R.4). Thus, this case falls squarely within the holding of this Court's decision in Ginebra. Therefore, the opinion of the Third District Court of Appeal should be reversed.

CONCLUSION

Based upon the foregoing facts, authorities and reasons, the trial court erred in granting Respondent's Motion to Vacate Plea and the Third District Court of Appeal was incorrect in affirming the trial court on appeal. Therefore, the order granting Respondent's Motion to Vacate Plea should be vacated and the decision of the Third District Court of Appeal should 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 MERITS was furnished by mail to BENNET LAPIDUS, ESQ., Abramson and Lapidus, P.A., 1320 South Dixie Highway, Suite 280, Coral Gables, Florida 33146 on this 18th day of August, 1987.


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