IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DOUGLAS DE ABREU,

Respondent.
_____/

Case No.: 79,569
1st DCA Case No.: 90-3718

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #0797200

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904)488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
STATEMENT OF JURISDICTION	5
SUMMARY OF THE ARGUMENT	6
ARGUMENT	
ISSUE	
WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX	
Abreu v. State, Case No. 90-3718 (Fla. 1st DCA Dec. 16, 1991)	A 1-3
Motion for Rehearing	A 4-10
Order Denying Motion for Rehearing	A 11

TABLE OF CITATIONS

CASES	PAGE(S)
Abreu v. State, Case No. 90-3718 (Fla. 1st DCA Dec. 26, 1991)	2
State v. Casseus, 513 So.2d 1045 (Fla. 1987)	6,7,8
State v. Fundora, 513 So.2d 122 (Fla. 1987)	6,7
State v. Ginebra, 511 So.2d 960 (Fla. 1987)	3,6,7,8
State v. Morris, 538 So.2d 514 (Fla. 3d DCA 1989)	6,7,8

OTHER AUTHORITIES	PAGE(S)
Fla. Const. art. V, §3(b)(3)	5
Fla. R. App. P. 9.030(a)(2)(A)(iv)	5
Fla. R. Crim. P. 3.172(c)(viii)	2-3,6
Fla. R. Crim. P. 3.172(i)	3
Fla. R. Crim. P. 3.850	2

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No.:
1st DCA Case No.: 90-3718

DOUGLAS DE ABREU,

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

Preliminary Statement

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, DOUGLAS DE ABREU, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the appendix will be noted by the symbol "A" and followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the First District's decision in Abreu v. State, Case No. 90-3718 (Fla. 1st DCA Dec. 26, 1991).

On April 23, 1990, respondent pled guilty to possession of cocaine (A 1). Pursuant to the plea agreement, the state recommended 18 months' probation (A 2). The trial court accepted the plea, withheld adjudication, and sentenced respondent to 18 months' probation, which expired on October 23, 1991 (A 2). Thereafter, agents of the Immigration and Naturalization Service arrested respondent and charged him with violation of immigration laws based on his conviction for possession of cocaine (A 2).

On October 15, 1990, respondent moved for postconviction relief under Fla. R. Crim. P. 3.850, arguing that (1) he entered his plea involuntarily because he did not know about, and the trial court did not advise him of, the immigration consequences; and (2) his trial counsel was ineffective for failing to advise him about the deportation consequences (A 2). On November 6, 1990, the trial court summarily denied respondent's motion, finding that he was not in custody for the purposes of rule 3.850.

Respondent appealed to the First District Court of Appeal which resolved the issue based on Fla. R. Crim. P. 3.172(c)(viii

(A 2).[1] The First District acknowledged rule 3.172(i)'s requirement of a showing of prejudice, finding that respondent's motion, "on its face, makes a showing that appellant's plea was entered involuntarily and that [respondent] .wasprejudiced by the trial court's failure to follow the procedure set forth in Rule. 3.172(c)(viii)." (A 3). The First District observed that respondent faced "the precise dilemma against which the rule is designed to protect -- the surprise threat of deportation resulting from an uninformed plea of guilty or nolo contendere." (A 3).

The state moved for rehearing, arguing that the court's holding created conflict with State v. Ginebra, 511 So.2d 960 (Fla. 1987). On March 16, 1992, the First denied the state's

---

[1] The rule provides:

> (c) Except where a defendant is not present for a plea, pursuant to the provision of Rule 3.180(c), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he understands the following:
>
> (viii) That is he or she pleads guilty or nolo contendere the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

motion, and on March 20, 1992, the state filed its notice to invoke this Court's discretionary jurisdiction. This jurisdictional brief follows.

STATEMENT OF JURISDICTION

The Supreme Court of Florida has jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Fla. Const. art. V, §3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

The instant decision directly and expressly conflicts with the following decisions from this Court and the Third District Court of Appeal: State v. Fundora, 513 So.2d 122 (Fla. 1987); State v. Casseus, 513 So.2d 1045 (Fla. 1987); State v. Ginebra, 511 So.2d 960 (Fla. 1987); and State v. Morris, 538 So.2d 514 (Fla. 3d DCA 1989).

In the instant decision, the First District held that, pursuant to Fla. R. Crim. P. 3.172(c)(viii), the trial court was required to advise respondent about the immigration/deportation consequences of his plea. Ginebra, however, explicitly characterizes deportation as a collateral consequence of a plea and states that trial courts must only advise defendants of the direct consequences of their pleas. Fundora, Casseus, and Morris all follow the reasoning of Ginebra. For this reason, this Court should exercise its discretionary jurisdiction.

ARGUMENT

Issue

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The decision of the First District in the present case directly and expressly conflicts with State v. Fundora, 513 So.2d 122 (Fla. 1987); State v. Casseus, 513 So.2d 1045 (Fla. 1987); State v. Ginebra, 511 So.2d 960 (Fla. 1987); and State v. Morris, 538 So.2d 514 (Fla. 3d DCA 1989). This conflict arises from the holding of the First District that the trial court in this case had a duty to advise respondent about deportation. The cited cases hold otherwise.

In Ginebra, this Court held that counsel's failure to advise his client of the collateral consequences of deportation does not constitute ineffective assistance of counsel. 511 So.2d at 962. In reaching this decision, this Court stated that trial courts have no duty to inform defendants of the collateral consequences of pleas, and that deportation is a collateral consequence because trial courts have no authority concerning deportation matters.

In Fundora, the defendant made the same claims as respondent, i.e., his counsel was ineffective for failing to advise him about deportation and his plea was made involuntary as a result of the lack of this information. This Court cited

to Ginebra, holding that the trial court's summary denial of the defendant's motion for postconviction relief was proper. Likewise, in Casseus, the defendant made the same claims as respondent. This Court again cited to Ginebra, holding that the claims were not valid grounds for collateral relief from the defendant's pleas.

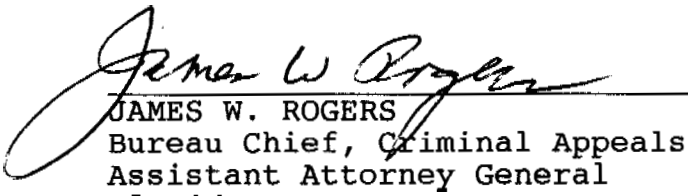
Finally, in Morris, the defendant sought postconviction relief, arguing that she had not been advised of the potential immigration law consequences of her plea. The Third District held that such a claim was completely foreclosed by Ginebra.

CONCLUSION

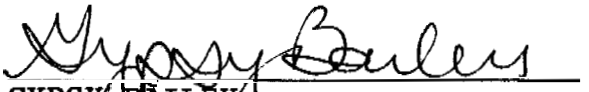
Based on the above cited legal authorities and arguments, the state respectfully requests this Court to exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
Bureau Chief, Criminal Appeals
Assistant Attorney General
Florida Bar #0325791



GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797200

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to DOUGLAS DE ABREU, Inmate No. 00205-265, Federal Deportation Center, Post Office Box 5060, Oakdale, Louisiana 71463, and *to* CHRISTOPHER CLAYTON, Assistant Public Defender, 330 East Bay Street, Suite 407, Jacksonville, Florida 32202, this 30th day of March, 1992.

6-630
1440

Gypsy Bailey

GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DOUGLAS DE ABREU,

Respondent.
_____/

Case No.:
1st DCA Case No.: 90-3718

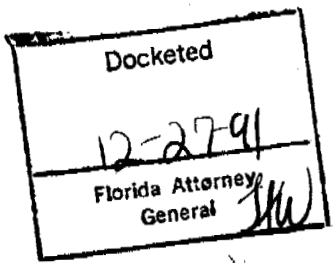
APPENDIX

Abreu v. State, Case No. 90-3718 (Fla. 1st DCA Dec. 16, 1991)

Motion for Rehearing

Order Denying Motion for Rehearing

91-110209
K TCR DB



IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DOUGLAS DE ABREU,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED,

CASE NO. 90-3718

Opinion filed December 26, 1991.

An appeal from the Circuit Court for Duval County, John D. Southwood, Judge.

Douglas De Abreu, pro se.

Robert A. Butterworth, Attorney General, Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant, Douglas De Abreu, appeals the trial court's denial of his motion for post-conviction relief filed pursuant *to* Florida Rule of Criminal Procedure 3.850. Appellant's motion raises several claims, one of which merits discussion. Taking as true the facts as related in the motion, appellant was charged with possession of cocaine, and on April 23, 1990, entered a plea of guilty to the stated charge. Pursuant to the plea agreement,

the state recommended a term of eighteen months of supervised probation which expired on October 23, 1991. The trial court accepted appellant's plea and withheld adjudication. After being placed on probation, appellant was arrested by agents of the Immigration and Naturalization Service and charged with violation of immigration laws based on appellant's conviction for possession of cocaine.

On appeal, among the issues raised, appellant argues that his plea was entered involuntarily because of the trial court's failure to inform him, as required by Florida Rule of Criminal Procedure 3.172(c)(viii), that if he is not a citizen of the United States, his plea may subject him to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service.[1] Pursuant to this

---

[1] Florida Rule of Criminal Procedure 3.172 states in pertinent part:

(c) Except where a defendant is not present for a plea, pursuant to the provisions of Rule 3.180(c), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he understands the 'following:

(viii) That if he or she pleads guilty or nolo contendere the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

court's order of October 1, 1991, the state filed a response to the claims raised in appellant's motion.

Although Florida Rule of Criminal Procedure 3.172(i) states that failure to follow any of the procedures in this Rule shall not render a plea void absent a showing of prejudice, it appears that appellant's motion, on its face, makes a showing that appellant's plea was entered involuntarily and that appellant was prejudiced by the trial court's failure to follow the procedure set forth in Rule 3.172(c)(viii). We find prejudice in the fact that appellant is now facing the precise dilemma against which the rule is designed to protect -- the surprise threat of deportation resulting from an uninformed plea of guilty of nolo contendere. As a consequence, we find it necessary to reverse and remand with directions to the trial court to either conduct an evidentiary hearing for the purpose of determining the voluntariness of appellant's plea, or to attach to the order a copy of that portion of the files and records which conclusively shows that appellant is entitled to no relief.

REVERSED and REMANDED for proceedings consistent with this opinion.

BOOTH, BARFIELD and MINER, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DOUGLAS DE ABREU,

Appellant,

v. Case No.: 90-3718

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING

Appellee, the State of Florida, by and through its undersigned counsel, and pursuant *to* Fla. R. App. P. 9.330, moves this court for rehearing of its December 26, 1991, opinion, and alleges the following.

History

On April 23, 1990, appellant was convicted of possession of cocaine and sentenced to 18 months' probation. On October 15, 1990, appellant filed the instant Fla. R. Crim. P. 3.850 motion, arguing that (1) he entered his plea involuntarily because he did not know about, and the trial court did not advise him of, the immigration consequences, and (2) his trial counsel was ineffective for failing to advise him about the deportation consequences of his plea. On November 6, 1990, the trial court summarily denied appellant's motion, finding that appellant was not in

custody for the purposes *of* **rule 3.850.** **On** December 1, 1990, appellant timely filed his notice of appeal.

On October 1, 1991, this court ordered the state to file a brief on behalf of the state, which the state did on October 18, 1991. On December 26, 1991, this court reversed and remanded for the trial court either to conduct an evidentiary hearing or attach portions of the record to the order which conclusively show that appellant is entitled to no relief, finding that appellant was prejudiced by the trial court's failure to follow Fla. R. Crim. P. 3.172(c)(viii).

Argument

In holding that the trial court was required to inform appellant that his **plea** could subject him to deportation, this court has created conflict with the **decision** of the Florida Supreme Court in State v. Ginebra, 511 So.2d *960* (Fla. 1987).[1] There, the Court found deportation to be a collateral consequence of a plea,[2] and held that defense

---

[1] Despite the state's citation to Ginebra in **its** brief, this court **did** not recognize that case in its opinion.

[2] "Deportation is not **a** direct consequence of a guilty plea because the trial court judge, whether state or federal, has no authority concerning deportation matters." 511 So.2d at 961. ***See*** also Edwards v. State, **393** So.2d 597, **601 (Fla. 3d DCA** 1981) (Hubbart, J., dissenting) ("Neither the trial court nor any agency in this state is authorized to deport a defendant upon the entry of **a** guilty plea in our courts; only the federal government, through its agencies and

counsel's failure to advise a defendant of such a collateral consequence did not constitute ineffective assistance of counsel.

The state acknowledges that the rules of criminal procedure now require trial courts to advise defendants of the possibility of deportation, but disagrees that trial courts must advise defendants of such a collateral consequence of a plea. "The trial judge's obligation to ensure that the defendants understands the direct consequences of his plea has been consistently interpreted to encompass only those consequences of the sentence which the trial court can impose." Ginebra, 511 So.2d at 961.[3] Since the trial court has no authority over deportation, it cannot have an obligation to advise defendants on this point. See also Polk v. State, 405 So.2d 758, 761-62 (Fla. 3d DCA 1981).

---

courts, has such authority. Moreover, it is entirely discretionary with the federal government . . . as to whether any deportation proceedings will be brought against a given alien.").

[3] Significantly, while four justices in In re Amendments to Florida Rules of Criminal Procedure, 536 So.2d 992 (Fla. 1988), amended the rules to require trial courts to advise defendants of possible deportation consequences! Justice Overton found such an amendment completely unnecessary, and the remaining three justices explicitly stated that Ginebra had not been overruled by the amendments to the rules.

Justice Overton aptly observed in In re Amendments to Florida Rules of Criminal Procedure, 536 So.2d 992, 1007 (Fla. 1988) (Overton, J., concurring and dissenting), that "[t]here is no constitutional right to such notification . . . . All the effects of a plea can never be fully covered by the court, and that is one of the primary reasons we require a defendant to have counsel." See also Wallace v. Turner, 695 So.2d 545, 548 (11th Cir. 1983) (violation of this type of state procedural rule does not of itself raise a constitutional question; in fact, the constitution does not mandate such procedures); Edwards v. State, 393 So.2d 597, 601 (Fla. 3d DCA 1981) (Hubbart, J., dissenting) ("not all preferred practice techniques raise to the level of a constitutional mandate."). After all, the only direct consequence of the plea was appellant's 18 month probationary term, about which appellant does not complain. See Polk 405 So.2d at 762.

"Admittedly, deportation consequences which may flow from the entry of a guilty plea are serious in nature, but then so are other collateral consequences attendant upon a guilty plea, such as loss of present employment, loss of a vast array of future employment opportunities, and loss of a host of civil rights. [However, a]ctual knowledge of these collateral consequences by a defendant is simply not a prerequisite to the entry of an otherwise voluntary guilty

plea." Edwards, 393 So.2d at 601 (Hubbart, J., dissenting). *See* also Ginebra, 511 So.2d at 962 ("there are numerous other collateral Consequences of which a defendant does not have to be knowledgeable **before** his plea is considered knowing and voluntary."). While it might be desirable that counsel and court both "develop the practice of advising defendants of the collateral consequences of pleading guilty; what is desirable is not the issue before" this court. United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985). See also Amendments, 536 So.2d at 1007 (Crimes, J., concurring) ("it is desirable henceforth to advise defendants that deportation may be one of the consequences to their guilty pleas."); Edwards, 393 So.2d at 601 **(Hubbast,** J., dissenting) ("trial judges , . . would be well-advised by today's decision to include in their standard guilty plea colloquy an inquiry as to whether the defendant is an alien, and if so, whether he has discussed with his counsel possible deportation consequences which may flow from the guilty plea."). Instead, the issue is whether appellant's otherwise valid plea transmogrified into an involuntary and unknowing one as a result of the trial court's failure to advise appellant of the possible deportation consequences of his plea. According to the rules themselves, the focus of this examination rests on a showing of prejudice by appellant. Fla. R. Crim. P. 3.172(i).

This court has consistently held that the failure to comply with rule 3.172 is an insufficient basis for reversal absent an allegation of prejudice or manifest injustice by defendants, Fitzgerald v. State, 414 So.2d 1121 (Fla. 1st DCA 1982). While this court was willing to find that appellant was prejudiced, Fitzgerald makes clear that appellant was required to make an allegation of prejudice; this he did not do, Moreover, he cannot point to a manifest injustice.

Conclusion

For these reasons, the state respectfully requests this Honorable Court to rehear its December 26, 1991, decision in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797200

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to DOUGLAS DE ABREU, Inmate #00205-265, Federal Deportation Center, Post Office Box 5060, Oakdale, Louisiana 71463, this 7th day of January, 1992.

GYPSY BAILEY
Assistant Attorney General

Bailey AHG

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone **No. (904)488-6151**

91-110209-Z

RECEIVED

MAR 17 1992

Criminal Appeals
Dept. of Legal Affairs

March 16, 1992

CASE NO: 90-03718

L.T. CASE NO. 90-4436CF

Douglas De Abreu v. State of Florida

Appellant(s), Appellee(s).

Docketed
3-17-92
Florida Attorney General

ORDER

Motion for rehearing, filed January 7, 1992, is DENIED.

By order of the Court

JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and **correct copy of the above** was **mailed this date to the following:**

Douglas De Abreu
Gypsy Bailey

James W. Rogers

Karen Roberts
Deputy Clerk

DISTRICT COURT OF APPEAL
SAT CITO SI RECTE
FIRST DISTRICT
STATE OF FLORIDA