IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,569

DOUGLAS DE ABREU,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v. Case No.: 79,569

DOUGLAS DE ABREU,

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PETITIONER'S BRIEF ON THE MERITS

Preliminary Statement

Petitioner, the State of Florida, respondent in the case below and the prosecuting authority in the trial court, will be **referred** to in this brief as the state. Respondent, DOUGLAS DE ABREU, petitioner in the case below and defendant in the trial court, will be referred to in this brief as respondent. References to the opinion of the First District contained in the attached appendix will be noted by the symbol "A," and references to the record on appeal (which contains only the motion for postconviction relief, memorandum of law, and order of denial) will be noted by the symbol "R." All references will be followed by the appropriate volume and page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the decision of the First District in which that court held that respondent's plea was entered involuntarily because, and respondent was prejudiced by, the trial court **failed** to follow the procedure set forth in **Fla.** R. Crim. P. 3.172(c)(viii).[1]

On April 23, 1990, respondent pled guilty to possession of cocaine (A 1; R 2, 8). Pursuant to the plea agreement, the state recommended 18 months' probation (A 1; R 8). The trial court accepted the plea, withheld adjudication, and sentenced respondent to 18 months probation, which expired

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[1] This 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 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.

on October 23, 1991 (A 1; R 1, 8). 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 1; R 8).

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 of his plea, and (2) his trial counsel was ineffective for failing to advise him about the deportation consequences of his plea (A 1-2; R 1-11). 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 (R 12).

Respondent appealed to the First District Court of Appeal, which ordered the state to file a Toler v. State, 493 So.2d 489 (Fla. 1st DCA 1986), brief. Therein, the state acknowledged that, under this Court's decision in Bolyea v. State, 520 So.2d 562 (Fla. 1988), the trial court incorrectly determined that respondent was not in custody for rule 3.850 purposes. The state also cited State v. Ginebra, 511 So.2d 960 (Fla. 1987), as controlling the merits of respondent's claim.

The First District resolved the issue based on rule 3.172(c)(viii), acknowledging the rule's requirement of a showing of prejudice, and finding that respondent's motion, "on its face, makes a showing that [respondent]'s plea was entered involuntarily and that [respondent] was prejudiced by the trial court's failure to follow the procedure set forth in Rule 3.172(c)(viii)." (A 2). 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 2).

The state moved for rehearing, arguing that the court's holding created conflict with Ginebra. On March 16, 1992, the First District denied this motion for rehearing. On March 20, 1992, the state filed its notice to invoke this Court's discretionary jurisdiction. On March 30, 1992, the state filed its brief on jurisdiction, and moved for a stay of the mandate of that same date. On April 30, 1992, this Court stayed the issuance of mandate from the First District. On September 8, 1992, this Court accepted jurisdiction of this cause, and ordered the state's brief on the merits to be filed on or before October 5, 1992.

SUMMARY OF THE ARGUMENT

Under this Court's own case law, it is plain that a trial court's failure to advise a defendant that entry of a nolo contendere or guilty plea may collaterally result in deportation is not a valid basis for the withdrawal of the plea as involuntary. Accordingly, this Court should disapprove of the decision of the First District.

ARGUMENT

Issue

WHETHER A TRIAL COURT'S FAILURE TO INFORM A DEFENDANT THAT ENTRY OF A GUILTY OR NOLO CONTENDERE PLEA MAY COLLATERALLY RESULT IN DEPORTATION IS A VALID BASIS FOR THE WITHDRAWAL OF THE PLEA AS INVOLUNTARY.

Based on this Court's own case law, the obvious answer to this question is no. In State v. Ginebra, 511 So.2d 960, 961 (Fla. 1987), this Court found deportation to be a collateral cansequence of a plea:[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." See State v. Fundora, 513 So.2d 122 (Fla. 1987); State v. Casseus, 513 So.2d 1045 (Fla. 1987). See also Edwards v. State, 393 So.2d 597, 601 (Fla. 3d DCA 1981)[3] (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 courts, has such authority. Moreover, it is entirely discretionary with the federal government . . . as to

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[2] This Court also held that defense counsel's failure to advise a defendant of such a consequence did not constitute ineffective assistance of counsel.

[3] Of more recent vintage from the Third District is State v. Morris, 538 So.2d 514 (Fla. 3d DCA 1989).

whether any deportation proceedings will be brought against a given alien.").

The state acknowledges that the rules of criminal procedure now require trial courts to advise defendants of the possibility of deportation, but disagrees that the failure of a trial court to advise a defendant of this collateral consequence renders an otherwise voluntary plea involuntary. "The trial judge's obligation to ensure that the defendant 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. Since state trial courts have absolutely no authority over deportation, these court can have no obligation of advise defendants on this point. See also Polk v. State, 405 So.2d 758, 761-62 (Fla. 3d DCA 1981).

Significantly, in In re Amendments to Florida Rules of Criminal Procedure, 536 So.2d 992 (Fla. 1988), only four justices joined the plurality decision to amend the rules to require trial courts to advise defendants of possible deportation consequences. Justices Overton and McDonald found such an amendment completely unnecessary, and Justice Grimes explicitly stated that Ginebra had not been overruled by the amendments to rule 3.172. Justice Overton aptly observed: "There 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." 536 So.2d at 1007 (Overton, J., concurring and dissenting). See also Wallace v. Turner, 695 F.2d 545, 548 (11th Cir. 1983) (a violation of this type of state procedural rule does not of itself raise a constitutional question; in fact, the constitution does not mandate such pracedures); Edwards, 393 So.2d at 601 (Hubbart, J., dissenting) ("not all preferred practice techniques raise to the level of a constitutional mandate."). After all, the only direct consequence of respondent's plea was his 18 month probationary term, about which respondent does not complain. See Polk, 405 So.2d at 762.

"Admittedly, deportation consequences which may flaw 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, ajctual 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."); Polk, 405 So.2d at 761-62 (listing a host of losses). While it might be desirable that counsel and court bath "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** (Grimes, 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** (Hubbart, **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 respondent's otherwise voluntary **plea** is transformed into an involuntary one as a result of the trial court's failure to advise him of a wholly collateral consequence of his plea. As shown above, resolution of this issue is clear based on case law from this Court itself.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to disapprove of the decision of the First District, and to reaffirm its own case law that the failure of a trial court to inform a defendant of the collateral consequence of deportation upon entry of a guilty or nolo contendere plea does not render that plea involuntary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to DOUGLAS DE ABREU, Inmate #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 5th day of October, 1992.

Gypsy Bailey

GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 79,569

DOUGLAS DE ABREU,

Respondent.

_____/

APPENDIX

Abreu v. State,

593 So.2d 233 (Fla. 1st DCA 1991)

...n. Rather, the certified question lim... issue presented to an application of *St...o v. Brooks*, 523 So.2d 1126 (Fla. 1988...

Inst... urge the Florida Supreme Court t... ...ess the question presented in my dissen... ...mplore the Supreme Court, as would a... ...licant, to unequivocally abolish this in... ...s doctrine.

James REEVES, III, ...pellant,

v.

STATE of Florida, ...ellee.

No. 90-3336.

District Court of Appeal ...lorida, First District.

Nov. 19, 1991.

On Motion for Certification Jan. ...992.

An Appeal from the Circuit Co... Duval County; R. Hudson Olliff, J...

Nancy A. Daniels, Public Defender, a... Steven A. Been, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Carolyn J. Mosley, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

AFFIRMED.

JOANOS, C.J., and WOLF and KAHN, JJ., concur.

ON MOTION FOR CERTIFICATION

PER CURIAM.

Appellant's motion for certification is granted, and we hereby certify to the Florida Supreme Court the following questions:

Does section 775.084, Florida Statutes (1989), authorize habitual felon sentencing for a criminal defendant who has previously been convicted of a violent offense enumerated in the statute, but who is currently being sentenced for a non-violent offense?

2. If section 775.084, Florida Statutes (1989), authorizes habitual felon sentencing for a criminal defendant who is currently being sentenced for a non-violent offense, does the statute violate the constitutional principles of equal protection, due process, double jeopardy, or ex post facto?

JOANOS, C.J., and WOLF and KAHN, JJ., concur.

UNISYS FINANCE CORPORATION, Appellant,

v.

AMP SERVICES, INC., et al., Appellees.

No. 90-838.

District Court of Appeal of Florida, Fifth District.

Nov. 21, 1991.

...ification Denied Feb. 17, 1992.

Cr... sued guarantors, seeking enforcemen... unconditional guaranty by which gua... promised to pay in event their corpo... did not. The Circuit Court, Orange ...nty, B.C. Muszynski, J., denied enforce... Creditor appealed. The District Cour... ...ppeal held that creditor was entitled t... ...rcement.

Reversed and re... ...ed.

Guaranty ⇐42(1)

Under unconditional ...ranty by which guarantors promised ...ake payments to creditor in event ... ...ault by guarantors' corporation, credito... ...re entitled to judgment for balance ...e from

...oration upon corporation's failure to ... payments and guarantors' failure to h... their guaranty.

Mic... L. Gore of Shutts & Bowen, Orlando, ...ppellant.

James ...oreland, Winter Park, for appellees.

PER CUR...

This is an a... from a judgment which denied enforce... of a guaranty.

Gordon and ... Case entered into a contract to gua... certain payments to appellant in the ... of default by their corporation, AMP ...es, Inc. The guaranty is unconditio... promises to pay in the event their ...oration does not.

Because the corpo... failed to make the payments the Ca... ...ere called upon to honor their guarant... ...ey did not and because of that appell... entitled to a judgment for the bala... ...ue from the corporation to appellant ...e amount of $19,090.55.

That portion of the ju... ...nt denying enforcement of the guarant... ...he amount of $19,090.55 is reversed an... cause is remanded for entry of judgm... ...or appellant.

REVERSED and REMAND...

GOSHORN, C.J., and DAUK... ...nd PETERSON, JJ., concur.

Douglas DE ABREU, Appellant,

v.

STATE of Florida, Appellee.

No. 90-3718.

District Court of Appeal of Florida, First District.

Dec. 26, 1991.

Rehearing Denied March 16, 1992.

Defendant convicted of drug offense moved for postconviction relief. The Circuit Court, Duval County, John D. Southwood, J., denied motion, and appeal was taken. The District Court of Appeal held that alleged failure to inform alien drug defendant that, if he was not American citizen, his guilty plea might subject him to deportation, at least facially rendered guilty plea involuntary, precluding summary denial of postconviction relief.

Reversed and remanded.

Criminal Law ⇐273.1(4), 998(19)

Alleged failure to inform alien drug defendant that, if he was not American citizen, his guilty plea might subject him to deportation, at least facially rendered guilty plea involuntary, precluding summary denial of postconviction relief. West's F.S.A. RCrP Rule 3.172(c)(viii).

Douglas De Abreu, pro se.

Robert A. Butterworth, Atty. Gen., Gypsy Bailey, Asst. Atty. Gen., 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 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 or 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.

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 should 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.

Sam BATLEMENTO, et al., Appellants,

v.

DOVE FOUNTAIN, INC., et al., Appellees.

No. 89-2460.

District Court of Appeal of Florida, Fifth District.

Dec. 27, 1991.

Rehearing Denied Feb. 21, 1992.

Restaurant purchasers brought suit against vendors for fraud, breach of management contract, violation of Business Opportunities Act and for civil redress of criminal practices. The Circuit Court for Orange County, Rogers Turner, J., rendered judgment in favor of purchasers, and vendors appealed. The District Court of Appeal, Griffin, held that: (1) allegations were inadequate to state cause of action for fraud, so reversal was not required on this basis; (2) Business Opportunities Act did not apply to sale of ongoing restaurant business; (3) highly unusual verdict form, which did not distinguish between individual or corporate defendants as to any count and contained no method for jurors to apportion amount of compensatory or punitive damages attributable to any defendant, was not fundamental error; (4) any item proved only through written damage summary was improperly awarded as part of damages; (5) purchasers could recover damages for losses incurred after they discovered the fraud; and (6) evidence that fraud exhausted purchasers' re-

sources was not relevant to determination of award of punitive damages.

Affirmed in part, reversed in part and remanded.

1. Fraud ⇐43, 45

Fraud pleading must identify representation of fact and how that representation is false. West's F.S.A. RCP Rule 1.120(b).

2. Pleading ⇐

Fraud pleading, which did no more than identify subject matter of alleged false representation of fact, lacked required particularity. West's F.S.A. RCP Rule 1.120(b).

3. Appeal and Error ⇐1039(4)

After favorable judgment for plaintiff, judgment is subject to reversal for defect in pleading only if defendant has been prejudiced by the error.

4. Appeal and Error ⇐10

Judgment for restaurant purchasers on fraud claim against vendors was not subject to reversal for lack of fraud content in the pleading, where one purchaser had identified his claims in a deposition early in the case.

5. Fraud ⇐27

Restaurant purchasers failed to establish fraud based on vendors' representation that $13,000 monthly would cover all expenses of restaurant when, in fact, it took more than $17,000 monthly to pay expenses and debt of the business.

6. Fraud ⇐64(1)

There was sufficient evidence to create jury question on issue of whether circumstances leading up to purchase of restaurant constituted fraud on purchasers.

7. Trade Regulation ⇐862.1

Business Opportunities Act did not apply to sale of ongoing restaurant business, even with attendant management agreement, use of certain recipes, formulae and menu, and purchase of some supplies. West's F.S.A. § 559.80 et seq.

8. Appeal and Error ⇐218.1

Highly unusual verdict form, which did not distinguish between individual or corporate defendants as to any count and contained no method for jurors to apportion amount of compensatory or punitive damages attributable to any defendant, was not fundamental error, where appellants were fully aware of this feature of the verdict form, and some trial strategy presumably motivated its use.

9. Evidence ⇐186(1)

Rule of evidence requiring "timely written notice" of intent to use summary must be strictly complied with, especially where record contains no evidence that underlying data from which summary was compiled was made available to complainant. West's F.S.A. § 90.956.

10. Appeal and Error ⇐233(2)

Renewed objection to written damage summary was not necessary when summary was admitted, where court had reserved ruling on issue when counsel had previously objected.

11. Damages ⇐184

Any item proved only through written damage summary was improperly awarded as part of damages. West's F.S.A. § 90.956.

12. Appeal and Error ⇐882(14)

Having chosen to submit damage issues to jury without differentiation among defendants, appellants could not complain about it on appeal.

13. ⇐60

Misled restaurant purchasers could recover damages for losses incurred after they discovered the fraud, where operator of business, as part of the inducement to purchaser to buy the business, undertook continuing undefined contractual duty to manage the restaurant.

14. Evidence ⇐

Generally, no reference should be made during trial to wealth or poverty of a party, nor should financial status of one party be contrasted with the other's.