IN THE SUPREME COURT OF FLORIDA

ROBERT EARL WOOD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 91,333

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Robert Earl Wood, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The symbol "R" will refer to the record on appeal. "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

For the most part, Florida Rule of Criminal Procedure 3.850 has supplanted the writ of error coram nobis, and therefore the only viable use for the writ of coram nobis is claims made when the defendant is no longer in custody. Thus, to prevent defendant from using the writ to circumvent Rule 3.850 and breathe life into time barred postconviction claims, the two-year time limitation as set forth in Rule 3.850 should apply to petition of writ of error coram nobis. Alternatively, should this Court determine that petitioner is not in custody and then hold that Rule 3.850 entirely supplants the writ of error coram nobis, the petition should be denied on the ground that no exceptions have been shown to the timeliness requirement of Rule 3.850.

ARGUMENT

ISSUE I

WHETHER THE TWO-YEAR TIME LIMITATION SET FORTH IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 SHOULD APPLY TO **PETITIONS** FOR **WRIT OF** ERROR CORAM **NOBIS?** (Restated)

In 1988, petitioner pled nolo contendere to reckless driving and possession of cocaine. (R.16-18). The trial court withheld adjudication and placed petitioner on probation. (R-22). Later, petitioner was incarcerated on federal charges, and his federal sentence was enhanced based on the 1988 Florida possession of drug charge. (R.63). In 1996, petitioner filed a petition for writ of error coram nobis claiming that his 1988 plea was involuntary because the plea was unlawfully induced in that his attorney failed to explain to him that the possession of drugs conviction could be used to enhance a subsequent sentence even when the court withheld adjudication. (R.57). The circuit court treated petitioner's petition as a motion for postconviction relief, and denied the petition. (R.78).

The First District Court of Appeal affirmed the circuit court's order, holding that a petition for writ of error coram nobis must satisfy the two-year time limitation of Rule 3.850. The First District stated that:

> In light of the supreme court's decision in Richardson v. State, 546 So.2d 1037 (Fla.1989), virtually all claims formally cognizable by petition for writ of error coram nobis may now be presented only under rule 3.850 which contains a requirement that the motion be filed within two years after the judgment and sentence become final. The only apparent continuing application for the writ of

> error coram nobis is in the situation where the petitioner would have a viable claim under rule 3.850 but for the "in custody" requirement. A petition for a writ of error coram nobis therefore must satisfy the two-year limitation of rule 3.850. If the two-year limitation were not applied to petitions for writs of error coram nobis, they could be used to circumvent the rule. By analogy, the case law precludes resort to a petition for writ of habeas corpus to pursue the time-barred claims of persons who are in custody. See, e.g., Patterson v. State, 664 So.2d 31 (Fla. 4th DCA 1995); Robbins v. State, 564 So.2d 256 (Fla. 1st DCA 1990).

Wood v. State, 698 So. 2d 293, 294 (Fla. 1st DCA 1997). The First District certified conflict with the Third District's decision in Malcolm v. State, 605 So. 2d 945 (Fla. 3d DCA 1992), which held that a petition for error coram nobis is not subject to the two-year time limitation. Wood at 294.

The common law writ of error coram nobis "is a discretionary writ and will not be employed if any other remedy exists." Ex parte Welles, 53 So.2d 708, 711 (Fla. 1951). Therefore, the petition can only be used "when it is necessary for the accused to bring some new fact before the court which cannot be presented in any of the methods provided by statute, but it will not lie in cases covered by statutory provisions." Nickels v. State, 98 So. 502 (Fla. 1923). Kinsey v. State, 19 So. 2d 706, 708 (Fla. 1944)("It is not the purpose of the writ of coram nobis to supplement or supersede appeal."). "Florida Rule of Criminal Procedure 3.850 has supplanted the writ of error corarn nobis[.]" Richardson v. State, 546 So.2d 1037 (Fla. 1989). "[T]he only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 as a remedy." Id. at 1039.

Moreover, "[t]he function of a writ of error coram nobis is to correct errors of fact, not errors of law." Hallman v. State, 371 So.2d 482, 485 (Fla. 1979). See Ex parte Welles, at 710("In our view the facts in this case bring it within the scope of the common law writ of error coram nobis, the primary purpose of which was to afford the trial court an opportunity to correct its own record with reference to vital facts not known to the court when the judgment was entered."). "The facts upon which the petition is based must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Hallman at 485.

Contrary to the Third District's decision in Malcolm v. State, 605 So. 2d 945 (Fla. 3d DCA 1992), there are limitation on when a petition of writ of error coram nobis may be filed. See Ashley v. State, 433 So.2d 1263, 1271 n.2 (Fla. 1st DCA 1983)("Failure to file a timely application for coram nobis is a sufficient ground to deny such relief in the absence of a good cause."); Cayson v. State, 139 So.2d 719, 723-724 (Fla. 1st DCA 1962)("It is the general rule that an applicant seeking the extraordinary writ of error coram nobis must diligently present the same."). In fact, this Court in Ex parte Welles, held that:

> In the Lamb[1] case we held that application for it must be made within the time provided by Statute for taking writ of error but when there is no such limitation on writs of error, there is none as to writs of error coram nobis.

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[1] Lamb v. State, 91 Fla. 396, 107 So. 535 (Fla. 1926).

> When the Lamb case was decided appeals in criminal cases were by writ of error, but since that decision writs of error have been abolished and review of criminal cases is now accomplished by appeal. Such appeals must be taken by the defendant within 90 days after the judgment is entered. If application for the writ is made in the trial court, in should be made within the time allowed for taking an appeal unless good cause is shown for a longer delay. If appeal has been taken to this Court the application may be made here for permission to apply to the trial court at any time before the case is decided, but in any event application must be made to this Court within 90 days from the date its judgment of affirmance is entered, unless good cause is shown for not applying within that time.

Id. at 711.

Because Rule 3.850 has supplanted the writ of error coram nobis, this Court should require that the petition for writ of coram nobis satisfy the two-year time limitation of Rule 3.850. "If the two-year limitation were not applied to petitions for writs of error coram nobis, they could be used to circumvent the rule." Wood at 294. A writ of coram nobis should not "be used by a person no longer in custody to breathe life into a postconviction claim previously time barred[.]" Vonia v. State, 680 So.2d 438, 439 (Fla. 2d DCA 1996). Therefore, the two-year time limitation as set forth in Rule 3.850 should apply to petitions for writ of error coram nobis.

Similarly, defendants, who are in custody, are not permitted to use petitions for writ of habeas corpus to avoid the two-year time limitation of rule 3.850. Isley v. State, 652 So.2d 409, 410 (Fla. 5th DCA 1995)("He will not be permitted to escape the two-year limit by labeling this or any other pleading as a petition for habeas corpus."); Patterson v. State, 664 So.2d 31 (Fla. 4th DCA

1995)(Court affirmed the denial of Patterson's petition for writ of habeas corpus seeking post-conviction relief filed outside the two year time limit of rule 3.850.); Robbins v. State, 564 So.2d 256, 257 (Fla. 1st DCA 1990)(Court affirmed the denial of Robbins petition for writ of habeas corpus holding that Robbins was "procedurally barred from seeking further relief by failing to meet the time constraints enumerated in Rule 3.850, Fla.R.Crim.P."). Thus, as the two-year time limitation of Rule 3.850 applies to petitions for writ of habeas corpus, it should also apply to petitions of writ of error coram nobis.

It should also be noted that the Criminal Appeals Reform Act of 1996, codified in Chapter 924, Florida Statutes (Supp.1996), provides in relevant part:

> (6) A petition or motion for collateral or other postconviction relief may not be considered if it is filed more than 2 years after the judgment and sentence became final in a noncapital case or more than 1 year after the judgment and sentence became final in a capital case in which a death sentence was imposed unless it alleges that:
>
> (a) The facts upon which the claim is predicated were unknown to the petitioner or his attorney and could not have been ascertained by the exercise of due diligence;
>
> (b) The fundamental constitutional right asserted was not established within the period provided for in this subsection and has been held to apply retroactively; or
>
> (c) The sentence imposed was illegal because it either exceeded the maximum or fell below the minimum authorized by statute for the criminal offense at issue. Either the state or the defendant may petition the trial court to vacate an illegal sentence at any time.

§ 924.051(6), Fla. Stat. (Supp.1996). This Court has since implemented section 924.051(6) by amending or creating Florida Rule of Appellate Procedure 9.140(j)(3) to require that petitions for belated appeal or writ of habeas corpus alleging ineffective assistance of appellate counsel be filed within a two year period. See also McCray v. State, 22 Fla. L. Weekly S627 (Fla. October 9, 1997)(This Court set forth a presumption of unreasonable delay and prejudice to the state when a petition for writ of habeas corpus claiming ineffective assistance of appellate counsel is filed more than five years after the petitioner's convictions became final.).

Petitioner's raises the issue of whether the circuit court's determination that he was "in custody" for purposes of Rule 3.850 was proper. Although this is beyond the scope of the certified question, the State, out of an abundance of caution, will respond. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982)("While we have the authority to entertain issues ancillary to those in a certified case, . . . we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case.").

In Howarth v. State, 673 So.2d 580 (Fla. 5th DCA), rev. denied, 680 So.2d 422 (Fla.1996), the Fifth District stated that "Rule 3.850 has, to a large extent, supplanted the writ of error coram nobis remedy. Error coram nobis is now available only to defendants challenging the validity of sentences for which they are no longer in custody.'' However, "if a defendant's prior conviction

is used to enhance a current sentence, the defendant is considered to be in custody for purposes of post-conviction relief." Id. See Duenas v. State, 636 So.2d 549, 550 (Fla. 2d DCA 1994)("[T]he convictions which appellant attacks were used to enhance the sentence he is currently serving. Thus, appellant is in custody for purposes of rule 3.850."); McArthur v. State, 597 So.2d 406, 407 (Fla. 1st DCA 1992)("For purposes of Florida Rule of Criminal Procedure 3.850, a prisoner seeking post-conviction relief need not be in custody under the sentence attacked, provided he contends 'the sentence he is serving was enhanced by the conviction he seeks to have set aside.'"). Thus, under Florida law, petitioner was in custody for purposes of filing a Rule 3.850 motion.

Nevertheless, regardless of whether petitioner was in custody or not, petitioner was not entitled to relief. Petitioner claimed that his 1988 plea was involuntary and his counsel was ineffective because he was unaware that the judgment for the possession of cocaine charge could be used against him to enhance a subsequent federal sentence. (R.57). However, "'a plea's possible enhancing effect on a subsequent sentence is merely a collateral consequence of the conviction; it is not the type of consequence about which a defendant must be advised before the defendant enters the plea.'" State v. Fox, 659 So.2d 1324, 1327 (Fla. 3d DCA 1995), rev. denied, 668 So.2d 602 (Fla.1996)(citations omitted). The Fox court held that "the sentencing court is not required to anticipate a defendant's recidivism." Id. "Therefore, the fact that the felony adjudication might be used against the defendant in a subsequent

federal prosecution was a collateral consequence of the plea and was not an issue the trial judge was required to cover in the plea colloquy." Id. See also Rh , 22 Fla. L. Weekly D2528(Fla. 3d DCA November 5, 1997)("We should not encourage recidivism, even implicitly, by adopting a rule of law which requires a defense attorney or trial court to 'warn' a defendant of the sentence-enhancing consequences his plea will have as to any future crimes he may commit."); State v. Garcia, 571 So.2d 38, 39 (Fla 3d DCA 1990); Simmons v. State, 611 So.2d 1250, 1252 (Fla. 2d DCA 1992)("Neither the trial court nor counsel is required to forewarn a defendant about every conceivable collateral consequence of a plea to criminal charges.").

Because neither the trial court nor defense counsel were required to anticipate petitioner's recidivism and forewarn him that his plea to the charge of possession of cocaine could be used to enhance a subsequent federal sentence, petitioner's plea was not involuntary and his counsel was not ineffective. Therefore, petitioner would not have been entitled to relief if had filed a timely direct appeal, motion for postconviction relief pursuant Rule 3.850, or petition for writ of error coram nobis. Accordingly, the circuit court correctly denied petitioner's petition, and this Court should affirm the decision of the First District.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 698 So. 2d 293 should be approved, and the order denying petitioner's petition entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Bruce S. Rogow, Esq. and Beverly A. Pohl, Esq., Bruce S. Rogow, P.A., 2441 S.W. 28th Avenue, Fort Lauderdale, Florida 33312, this 1st day of December, 1997.

Trisha E. Meggs
Attorney for the State of Florida

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Appendix

should be reduced to the 17.5% negligence the jury attributed to the County. This leads to a total of $10,552.85. The damages awarded to the widow are $133,280. After reduction to 17.5%, the County is responsible for $23,324. As for the five children who were each awarded damages of $50,000, the County is responsible for 17.5% thereof for a total of $8,750 for each child. The sixth child was awarded $20,000 in damages, of which the County is responsible for $3,500, representing 17.5% of the jury's award.

We affirm the judgment of liability against the County, and affirm the costs judgment, *see Berek*, 422 So.2d at 840, we reverse the damage awards and remand for entry of damage awards consistent with this opinion.

Remaining points lack merit.

Affirmed in part; reversed in part and remanded.

Robert Earl WOOD, Appellant,

v.

STATE of Florida, Appellee.

No. 96-4336.

District Court of Appeal of Florida, First District.

July 11, 1997.

Rehearing Denied Aug. 22, 1997.

Petitioner appealed from order of the Circuit Court, Bay County, Dedee Costello, J., denying his petition for writ of error coram nobis. The District Court of Appeal, Allen, J., held that petition for writ of error coram nobis was filed beyond the two-year time limitation of postconviction relief rule, and thus was properly denied as untimely.

Affirmed.

1. Criminal Law ⇐997.4, 998(1)

Virtually all claims formally cognizable by petition for writ of error coram nobis may now be presented only under postconviction relief rule, and only apparent continuing application for writ of error coram nobis is in situation where petitioner would have a viable claim under postconviction relief rule but for its "in custody" requirement. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⇐997.12

Petition for a writ of error coratn nobis must satisfy two-year limitation of postconviction relief rule. West's F.S.A. RCrP Rule 3.850.

Robert Earl Wood, Marianna, Pro Se.

Robert Butterworth, Attorney General, and Trisha E. Meggs, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, Judge.

The appellant challenges an order by which the trial court denied his petition for a writ of error coram nobis because it was filed beyond the two-year time period specified in Florida Rule of Criminal Procedure 3.850. We affirm the order, but we certify conflict with *Malcolm v. State, 605* So.2d 945 (Fla. 3d DCA 1992).

In 1996, the appellant filed a petition for a writ of error coram nobis in which he challenged two 1988 convictions. The appellant apparently sought a writ of error coram nobis rather than relief under rule 3.850 because he had completed his sentence for the 1988 convictions and was no longer "in custody" as required for relief under the rule. Because the petition was filed more than two years after the 1988 convictions became final, the trial court denied the petition as untimely.

[1, 2] In light of the supreme court's decision in *Richardson v. State,* 546 So.2d 1037 (Fla.1989), virtually all claims formally cognizable by petition for writ of error coram nobis may now be presented only under rule 3.850 which contains a requirement that the motion be filed within two years after the judgment and sentence become final. The

only apparent continuing application for the writ of error coram nobis is in the situation where the petitioner would have a viable claim under rule **3.850** but for the "in custody" requirement. **A** petition for a writ of error coram nobis therefore must satisfy the two-year limitation of rule 3.850. If the two-year limitation were not applied to petitions for writs of error coram nobis, they could be used to circumvent the rule. By analogy, the case law precludes resort to a petition for writ of habeas corpus to pursue the time-barred claims of persons who are in custody. ***See, e.g., Patterson.*** v. ***State,*** **664** So.2d **31** (Fla. 4th **DCA** 1995); *Robbins v. State,* 564 So.2d **256** (Fla. 1st **DCA** 1990).

Because the appellant's petition in the present case was filed beyond the two-year **time** limitation, it was properly denied as untimely. ***See*** *Vonia v. State,* ***680*** Sodd ***438*** (Fla. **2d DCA** 1996).

We recognize that the court in *Malcolm* expressly held that a petition for writ of **error** coram nobis is not subject to the two-year time limitation. We therefore certify conflict with *Malcolm.*

AFFIRMED.

WEBSTER and PADOVANO, JJ., concur.

WATKINS ENGINEERS & CONSTRUCTORS and Gallagher **Bassett,** Appellants,

v.

Charles WISE, Appellee.

No. 96–2641.

District Court of Appeal of Florida, First District.

July 16, 1997.

Rehearing Denied Aug. **26,** 1997.

Employer and insurance carrier (E/C) appealed order of Judge of Compensation Claims (JCC), Michael J. DeMarko, finding claimant was permanently and totally disabled (PTD) **as** result of his chronic obstructive pulmonary disease (COPD), an occupational disease. The District Court *of* Appeal, Ervin, J., held that: (I) claimant was not required to prove that his work-related exposure to ammonium nitrate pellets was major contributing cause of his disability; **(2)** E/C was responsible for entire amount of compensation due; **(3)** JCC properly denied E/C's motion for independent medical examination (IME) by physician; and **(4)** E/C failed to show **how** it **was** prejudiced by exclusion and unsworn testimony of expert in industrial hygiene, and thus, E/C failed to demonstrate reversible **error.**

Affirmed.

1. Workers' Compensation ⇐547

So long as workers' compensation claimant's occupational disease **fit** within statutorily enumerated criteria for establishing occupational disease, such disease constituted compensable injury and claimant was not required to prove that his work-related exposure to ammonium nitrate pellets **was** major contributing cause of his disability. West's F.S.A. §§ 440.02(32), 440.151(1)(a).

2. Workers' Compensation ⇐549

Employer and insurance carrier (E/C) were responsible for entire amount of compensation **due** to workers' compensation claimant for his chronic obstructive pulmonary disease (COPD), an occupational disease, where there was no competent, substantial evidence regarding percentage **of** claimant's disability attributed to his smoking as opposed to his work-related exposure to ammonium nitrate pellets. West's F.S.A. § 440.151(1)(c).

3. Workers' Compensation ⇐1313

Judge of Compensation Claims (JCC) properly denied motion by employer and insurance carrier (E/C) for independent medical examination (IME) by physician, where other physician had already performed TME for E/C and E/C failed *to* show some aspect