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FILED

SID J. WHITE

MAY 14 1998

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,653

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

VICTOR WILLIAM ROSS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, the **STATE OF FLORIDA**, was the Appellee below. The Petitioner, **VICTOR WILLIAM ROSS**, was the Appellant below. The parties will be referred to as the State and the Petitioner. The symbol "R" will designate the record on appeal, the symbol "T" will designate the transcript of proceedings and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement of the case and facts as a substantially accurate account of the proceedings below.

QUESTION PRESENTED

WHETHER CORAM NOBIS IS A LIMITED REMEDY FOR INDIVIDUALS WHO ARE NOT IN CUSTODY, HAVE A NEWLY DISCOVERED EVIDENCE CLAIM OR AN ERROR IN FACT THAT WOULD HAVE CONCLUSIVELY PREVENTED THE TRIAL COURT FROM ENTERING THE JUDGMENT AND FOR WHICH ANOTHER REMEDY NEVER EXISTED?

A

IS CORAM NOBIS RELIEF AVAILABLE TO VACATE THE PLEA OF A NON-CUSTODIAL DEFENDANT WHO FIRST FEELS THE EFFECTS OF THE TRIAL COURT'S FAILURE TO ADVISE HIM OF THE IMMIGRATION CONSEQUENCES WHEN INS EXCLUSION PROCEEDINGS ARE INITIATED AGAINST HIM?

B

SHOULD RULE 3.850'S TWO YEAR PERIOD OF LIMITATIONS BE SUPERIMPOSED UPON PETITIONS FOR WRITS OF ERROR CORAM NOBIS WHERE THE CLAIMS PROPERLY COGNIZABLE UNDER CORAM NOBIS ARE THE SAME CLAIMS THAT ARE EXCEPTED FROM RULE 3.850'S LIMITATIONS PERIOD?

C

SHOULD A DEFENDANT BE REQUIRED TO ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL TO SECURE RELIEF FROM AN INVOLUNTARY PLEA RESULTING FROM THE TRIAL COURT'S FAILURE TO ADVISE THE DEFENDANT OF ADVERSE IMMIGRATION CONSEQUENCES?

D

SHOULD THIS COURT REFER TO THE
CRIMINAL RULES COMMITTEE THE
QUESTION OF WHETHER RULE 3.850
SHOULD BE AMENDED TO PROVIDE RELIEF
TO DEFENDANT'S WHO WERE NEVER IN
CUSTODY AFTER CONVICTION?

SUMMARY OF THE ARGUMENT

The purpose of the writ of error coram nobis is to enable a party against whom a judgment has been rendered to gain relief from the judgment by applying to the same court in which the judgment was rendered. It is brought to show an error in fact, defect in process, default in performance of duty by ministerial officers, and other matters none of which are apparent from the record. The showing must be such that if the matters shown had been before the trial court when the judgment was entered, the trial court would have been precluded from entering the judgment. The party seeking the writ must have no other remedy.

Thus a claim that a plea was involuntary because the trial court failed to advise the defendant of the deportation consequences of the plea is not the proper subject for a coram nobis petition where the defendant was in custody after the plea. Coram nobis is also not available since the failure to advise a defendant of the deportation consequences of his plea is not an error of fact or is its ascertainment after the defendant is no longer in custody considered newly discovered evidence.

There is no two year time limit to file a coram nobis petition since it applies only to claims which a defendant can allege factual innocence or show a defect in process. These are exceptions to the two year time period for filing post conviction relief motions and thus such a holding would be in accordance with

established precedents.

When a defendant is in custody, he can file a timely motion for post conviction relief alleging his plea was involuntary because he was not told of the deportation consequences of his plea. However, the mere fact that the record supports the claim is insufficient to grant relief. The defendant must show prejudice in the form that he would have been acquitted of the charge had he gone to trial.

Finally, the question of whether Rule 3.850 should be amended to provide relief to Defendant's who were never in custody after conviction should be referred to the Criminal Rules Committee for consideration.

ARGUMENT

CORAM NOBIS IS A LIMITED REMEDY FOR INDIVIDUALS WHO ARE NOT IN CUSTODY, HAVE A NEWLY DISCOVERED EVIDENCE CLAIM OR AN ERROR IN FACT THAT WOULD HAVE CONCLUSIVELY PREVENTED THE TRIAL COURT FROM ENTERING THE JUDGMENT AND FOR WHICH ANOTHER REMEDY NEVER EXISTED.

The purpose of the writ of error coram nobis is to enable a party against whom a judgment has been rendered to gain relief from the judgment by applying to the same court in which the judgment was rendered. It is brought to show an error in fact, defect in process, default in performance of duty by ministerial officers, and other matters none of which are apparent from the record. The showing must be such that if the matters shown had been before the trial court when the judgment was entered, the trial court would have been precluded from entering the judgment. The party seeking the writ must have no other remedy. *Russ v. State*, 95 So. 2d 594, (Fla. 1957).

In *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989) this Court recognized that Florida Rule of Criminal Procedure 3.850 has absorbed many of the claims traditionally brought under habeas corpus and coram nobis. This Court found that a Rule 3.850 motion is the appropriate place to bring newly discovered evidence claims since it is one of the exceptions to the two year time limitation for bringing claims under the rule where it is alleged that the

facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence. This Court then held that the 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. Therefore, errors of fact which are newly discovered as contemplated by Rule 3.850, unascertainable by the exercise of due diligence, are those that are cognizable by writ of error coram nobis.

The second area covered by coram nobis is defect of process. This area also has its counterpart in Rule 3.850 and can heard under the exception to the two-year time limitation for bringing claims under the rule when the fundamental constitutional right asserted was not established within the period provided for and has been held to apply retroactively. In *Weir v. State*, 319 So. 2d 80 (Fla. 2d DCA 1975) a writ of error coram nobis was granted where the defendant was no longer in custody and he alleged his *Gideon v. Wainwright*, 372 U.S. 335 (1963) right to counsel was violated. The Court found that the right to appointed counsel in felony prosecutions is a fundamental right with retroactive application. Based on defect of process, and not ineffective assistance of counsel, the writ was granted. The writ was granted because not only was the defendant not in custody but when he was in custody the right to counsel did not exist and therefore the defendant had

no other remedy.

The third area covered by coram nobis is to correct an error in the court's record caused by a default in the performance of a duty by a ministerial officer. In *Malcolm v. State*, 605 So. 2d 945 (Fla. 3d DCA 1992) the Court held that when a clerk misperforms a ministerial duty by recording the wrong judgment of conviction, coram nobis was appropriate, regardless of due diligence, to correct a patent error in the record caused by the clerk.

The fourth area covered by coram nobis, all other matters not apparent from the face of the record, has been absorbed by Rule. 3.850. *Richardson v. State*, 546 So. 2d 1037 (Fla 1989) (claims based on alleged knowing use of perjured testimony and claims of suppression of evidence by the prosecution are cognizable in Rule 3.850 proceedings).

Not only does a writ of coram nobis require that the petitioner not be in custody at the time it is filed and the subject mater must be one of those listed above, but the party seeking the writ must have no other remedy. This means that the party has no remedy at all and not that the once available remedy is now time barred. *Sullivan v. State*, 154 Fla 496, 18 So 2d 163 (1944) (the writ does not lie to give relief to an irregularity arising in connection with a petit juror's disqualification, although the defendant did not discover the error until after the time for a new trial has expired); *Vonia v. State*, 680 So. 2d 438

(Fla 2nd DCA 1996) (writ of error coram nobis did not concern itself with newly discovered evidence or with questions of fact, could not be used to collaterally attack a defendant's expired sentences, where the defendant had not sought post conviction relief, so that defendant's claim would have been procedurally barred even if he had still been incarcerated on the conviction attacked).

In accordance with the foregoing a claim of ineffective assistance of counsel is not a proper subject for a writ of error coram nobis since the claim can be raised in either a Rule 3.850 motion or a petition for writ of habeas corpus. *Snell v. State*, 28 So. 2d 863 (Fla 1947). Also a claim that a guilty or nolo plea was not voluntary is also not a proper claim for coram nobis since it can be raised in a Rule 3.850 motion or a motion to withdraw or vacate plea, unless it was unknown to the court at the time of the plea that the plea was entered into because of actual dominating fraud, duress or other unlawful means actually asserted by some one not in privity with the petitioner or counsel. *La Rocca v. State*, 151 So. 2d 64 (Fla. 2d DCA 1963); *Nickels v. State*, 86 Fla. 208, 99 So. 121 (1924) (writ of error coram nobis proper vehicle to vacate plea where plea was entered because of fear of mob violence); *State v. Garcia*, 571 So. 2d 38 (Fla. 3d DCA 1990) (coram nobis is an inappropriate remedy when it is alleged the a plea is involuntary for the failure of the trial court to insure that the defendant was

aware of the consequences of his plea).

For individuals who are not in custody a writ of error coram nobis is the appropriate remedy to raise claims of newly discovered evidence or other errors in fact, which could not have been discovered with due diligence and the result of which would conclusively have prevented the trial court from originally entering the judgment. It is also available to individuals who are not in custody to raise issues concerning defect of process or failure to do ministerial duties. The individual filing the writ must not have any other remedy available. The failure to timely utilize a remedy it, does not equate to the absence of a remedy.

With these legal principles in mind the State will address the issues raised by the Petitioner herein.

A

**CORAM NOBIS RELIEF IS NOT AVAILABLE
TO VACATE THE PLEA OF A NON-
CUSTODIAL DEFENDANT WHO FIRST FEELS
THE EFFECTS OF THE TRIAL COURT'S
FAILURE TO ADVISE HIM OF THE
IMMIGRATION CONSEQUENCES WHEN INS
EXCLUSION PROCEEDINGS ARE INITIATED
AGAINST HIM.**

In 1980, Petitioner pled guilty to drug charges, adjudication was withheld and he was sentenced to eighteen months probation. He asserts that the trial court misadvised him by stating there should be no deportation consequences as a result of the plea because a withhold was not a conviction. Petitioner was a citizen of Grenada

and a legal United States resident alien. In 1996, Petitioner applied for naturalization and was informed by INS that he would be deported because of his 1980 plea. Petitioner filed for coram nobis relief, asserting that his plea should be vacated because had he been correctly advised he would not have entered the plea.

Since Petitioner pled guilty and was placed on probation for eighteen months, his only avenue for post-conviction relief is Rule 3.850. Although he is no longer in custody and 2 year limitation has elapsed, coram nobis is not available to Petitioner because he had another remedy, but failed to use it. Relief is also not available by a motion to withdraw or vacate the plea pursuant to Rule 3.170 Fla.R.Crim.P because it is only cognizable on direct appeal. *Suarez v. State*, 616 So. 2d 1067 (Fla. 3d DCA 1993). Since Petitioner was in custody for two years and this claim could only be raised in a Rule 3.850 motion, the two year limitation period began to run when the judgment and sentence was final. *Vonia v. State*, 680 So. 2d 438 (Fla. 2d DCA 1996) (writ of error coram nobis that did not concern itself with newly discovered evidence or with questions of fact could not be used to collaterally attack defendant's expired sentences, where defendant had not sought post-conviction relief, so that defendant's claim would have been procedurally barred even if he had still been incarcerated on conviction he attacked).

In order to avoid the harsh reality that he is not entitled to

the writ of coram nobis because Petitioner had an available remedy but failed to utilize it, he claims that the two year limitations period did not begin to run until INS began Petitioner's deportation proceeding. Petitioner then reasons, that since he did not learn of the deportation proceedings until after the limitations period ended, he never had a remedy other than coram nobis to cure the defects in the plea.

This position, as recognized by the Third District, is directly contrary to the terms of Florida Rules of Criminal Procedure 3.850. Rule 3.850(b), specifically states that a motion thereunder must be brought within two years "after judgment and sentence become final." (A. 9). This provision has consistently been applied to claims of involuntary pleas. See *Gradison v. State*, 654 So. 2d 635, (Fla. 1st DCA 1995) (postconviction motion challenging voluntariness of nolo contendere plea was untimely where it was filed more than two years after the judgment and sentence became final); *Mitchell v. State*, 638 So. 2d 606 (Fla. 1st DCA 1994) (same); *Baggett v. State*, 637 So. 2d 303 (Fla. 1st DCA 1994) (same); *State v. Morris*, 538 So. 2d 514 (Fla. 3d DCA 1989) (same). The application of this principle to a claim of involuntary plea is within the proper framework of Rule 3.850 litigation because the alleged defect in the plea occurred at the time the plea was entered and not when the effects of the defect are felt by the defendant. Any other interpretation would be

contrary to the terms of Rule 3.850 (a) which specifically lists as a ground covered by the Rule a plea that was involuntarily given. As such, Petitioner had a remedy to challenge the voluntariness of his plea. Thus, the Third District correctly held that coram nobis was an improper remedy because Petitioner had Rule 3.850 relief available to him. (A. 9).

The Petitioner next contends that the instant claim also satisfies the next prong of coram nobis since an involuntary plea is a error of fact which is newly discovered evidence. Neither of these claims withstand close scrutiny.

To support his contention that the claim of an involuntary plea is an error of fact, Petitioner relies on cases which hold that the determination of the voluntariness of a plea is a question of fact. The State does not dispute this statement, but does dispute its applicability to the issue at hand. A question of fact arises when two or more conclusions can be drawn from the facts. *Loftin v. McGregor*, 152 Fla. 813, 14 So. 2d 574 (Fla. 1943). This definition as applied to the determination of the voluntariness of a plea is correct since the trial court usually has to make its decision based on two sets of facts. However simply because the trial court's determination is labeled a question of fact, it does not automatically mean an error of fact. This is so because an error of fact is defined as one which conclusively would have prevented the entry of the judgment and sentenced attacked.

Hallman v. State, 371 So. 2d 482 (Fla. 1957). Thus, a defendant is entitled to relief only when the question of fact is determined in his favor, while a defendant is entitled to relief upon establishment of the error of fact regardless of what other evidence is present. Therefore, it is clear that a claim of an involuntary plea does not involve an error of fact but instead involves a error of law. *State v. Garcia*, 571 So. 2d 38 (Fla 3d DCA 1990) (claim that guilty plea had not been knowingly and intelligently made because the defendant was not aware of the consequences of his plea is an error of law and not within the function of a writ of error coram nobis.)

The Petitioner's claim of newly discovered evidence is the same reason why he is not barred by the two year time limit of Rule 3.850 and that is that the plea did not become involuntary until INS sought his deportation. This position is meritless since a defendant in order to establish evidence as newly discovered he must show that it (1) was not known to him or his counsel at the time of or plea and could not have been ascertained by the exercise of due diligence; and (2) of such a nature that it would probably produce an acquittal. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Petitioner's claim fails because the "fact" that he was not advised of the immigration consequences of his plea was evident from his plea colloquy and thus was easily ascertainable with the minimal exercise of diligence. Further, the "fact" that he was not advised

of the immigration consequences of his plea would not provide for an acquittal, just a retrial or a new plea. Thus, it is evident that Petitioner's claim of an involuntary plea can not meet the requirements of newly discovered evidence.

B

RULE 3.850'S TWO YEAR PERIOD OF LIMITATIONS SHOULD NOT BE SUPERIMPOSED UPON PETITIONS FOR WRITS OF ERROR CORAM NOBIS WHERE THE CLAIMS PROPERLY COGNIZABLE UNDER CORAM NOBIS ARE THE SAME CLAIMS THAT ARE EXCEPTED FROM RULE 3.850'S LIMITATIONS PERIOD.

The only legal claims that can be raised in coram nobis are an error of fact and a defect in process. *Russ v. State*, 95 So. 2d 594 (Fla. 1957). Both of the claims, if the defendant is in custody, is excepted from the two year limitations period of Rule 3.850. An error of fact is covered by Rule 3.850(b)(1) as newly discovered evidence. A defect in process is covered Rule 3.850(b)(2) as a fundamental constitutional right that was not established within the limitations period and has been held to apply retroactively. Thus, if the scope of coram nobis is properly limited, than the State agrees that the two year limitation period of Rule 3,850 should not be superimposed upon coram nobis.

However, if this Court interprets coram nobis in the expansive manner that Petitioner is requesting, then the two year limitation period of Rule 3,850 should be superimposed upon coram nobis. This

so because to do otherwise would give those defendant's no longer in custody greater rights to vacate judgments and sentences than those defendant's who are in custody.

C

A DEFENDANT SHOULD BE REQUIRED TO ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL TO SECURE RELIEF FROM AN INVOLUNTARY PLEA RESULTING FROM THE TRIAL COURT'S FAILURE TO ADVISE THE DEFENDANT OF ADVERSE IMMIGRATION CONSEQUENCES.

Florida Rule of Criminal Procedure 3.172(c)(8) requires trial judges to inform all defendants of the possibility of deportation when accepting guilty or nolo pleas. However, Florida Rule of Criminal Procedure 3.172(I) also provides that "[f]ailure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." (emphasis added). Furthermore in *Wuornos v. State*, 676 So. 2d 966 (Fla. 1996), this Court specifically approved of the following portion of the First District's opinion in *Fuller v. State*, 578 So. 2d 887, 889 (Fla. 1st DCA 1991), *quashed on other grounds*, 595 So. 2d 20 (Fla. 1992):

In the absence of an allegation of prejudice or manifest injustice to the defendant, the trial court's failure to adhere to rule 3.172 is an insufficient basis for reversal.

Id.; see also *State v. Fox*, 659 So. 2d 1324, 1326 (Fla. 3d DCA 1995), *rev. denied*, 668 So. 2d 602 (Fla. 1996) (citing *Willkerson v. State*, 401 So. 2d 1110, 1112 (Fla. 1981); *State v. Will*, 645 So.

2d 91, 93 (Fla. 3d DCA 1994); *Suarez v. State*, 616 So. 2d 1067, 1068 (Fla. 3d DCA 1993). Also, "it is the defendant's burden to establish prejudice or manifest injustice. '[I]t is not sufficient to simply make bald assertions.'" *Fox*, 659 So. 2d at 1327 (quoting *State v. Caudle*, 504 So. 2d 419, 421 (Fla. 5th DCA 1987)).

In order to properly allege prejudice in this context, a defendant must claim that had he been informed of the possibility of deportation, he would have rejected the plea offer and gone to trial. Additionally, and more importantly, he must claim that had he gone to trial, he would have most probably been acquitted. The reason this is a necessary allegation is that the defendant would have faced the same deportation consequences if he had been convicted following a trial even if the court withheld adjudication after trial.

The State submits that this reasoning is sound and that this portion of the Third District's opinion fully comports with prejudice requirement as set forth in Florida Rule of Criminal Procedure 3.172(I). This reasoning, as stated by the Third District should be adopted by this Court as its own.

As guidance to Prieto and others who would assert similar claims, we point out that to set aside a plea for failure to inform a defendant of immigration consequences pursuant to Rule 3.172(c)(8), the motion must assert, and the defendant must prove the following:

- a) the defendant was not advised by the court of the immigration consequences;
- b) that defendant had no actual knowledge of

same;
c) that INS had instituted deportation proceedings, or defendant is at risk of deportation;
d) that defendant would not have pled had defendant known of the deportation consequences; and
e) that had defendant declined the plea offer and gone to trial, defendant most probably would have been acquitted.

This last requirement comports with the Rule 3.172 requirement that defendant must show prejudice to set aside a plea as not in conformity with the Rule. Because of the special nature of the claims in these cases, that deportation has resulted as a consequence of the pleas, in order to demonstrate prejudice the defendant must demonstrate a probable likelihood that he or she would have been acquitted. To require any less of a showing would subject the trial court to entertaining petitions for relief to set aside pleas in cases where the defendant would nonetheless be found guilty at trial and therefore would be facing the same consequence of deportation. See generally *Jones v. State*, 591 So. 2d 911 (Fla. 1991); *State v. Fox*, 659 So. 2d 1324 (Fla. 3d DCA 1995), review denied, 668 So. 2d 602 (Fla. 1996); *Todd v. State*, 648 So. 2d 249 (Fla. 3d DCA 1994).

Requiring that the defendants establish that they most probably would have been acquitted is concordant with this court's conclusion that these motions must be brought within two years after judgment and sentence become final, as required in Rule 3.850. This two-year limitation assures some realistic probability that evidence will remain available and that the trial court can reliably determine whether defendant most likely would have prevailed at trial. If we adopt defendants' argument that the triggering event is the onset of deportation proceedings, in many cases the court files will be quite stale and evidence or witnesses may or may not be available. The two-year limit addresses this problem.

(A. 11-13).

D

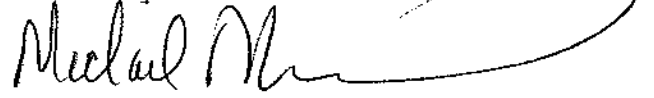
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QUESTION OF WHETHER RULE 3.850
SHOULD BE AMENDED TO PROVIDE RELIEF
TO DEFENDANTS WHO WERE NEVER IN
CUSTODY AFTER CONVICTION.

Finally, the question of whether Rule 3.850 should be amended to provide relief to Defendant's who were never in custody after conviction should be referred to the Criminal Rules Committee for consideration.

CONCLUSION

Based on the foregoing, Petitioner requests this Court affirm in total the decision of the District Court.

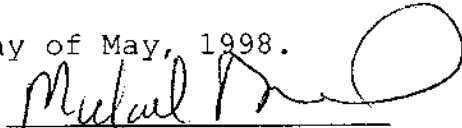
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** was furnished by mail to **LEONARD J. COOPERMAN**, Attorney for Petitioner, 1190 N.E. 89th Street, Miami, Florida 33138 on this 11 day of May, 1998.



MICHAEL J. NEIMAND
Assistant Attorney General