

IN THE FLORIDA SUPREME COURT

CASE N^o 92,844

DANTE RUBIO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

HERSCH & TALISMAN, P.A.
Attorneys for Petitioner
1110 Brickell Avenue
Penthouse One
Miami, Florida 33131
Telephone: (305) 358-0570

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE AND FACTS	1
FACTUAL STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

	PAGE
<i>Brown v. State</i> , 245 So. 2d 41 (Fla. 1971)	8
<i>Costello v. State</i> , 260 So.2d 198 (Fla. 1972)	8
<i>Koenig v. State</i> , 597 So.2d 256 (Fla. 1992)	4
<i>Marriott v. State</i> , 605 So. 2d 985 (Fla. 4 th DCA 1992)	1
<i>Peart v. State</i> , 705 So.2d 1059 (Fla. 3d DCA 1998)	1
<i>Rubio v. State</i> , 706 So.2d 957 (Fla. 3d DCA 1998)	1
<i>State v. Ginebra</i> , 511 So.2d 960 (Fla. 1987)	8
<i>State v. Leroux</i> , 689 So. 2d 235 (Fla. 1996)	8
<i>Taylor v. State</i> , 710 So.2d 636 (Fla. 3d DCA 1998)	9
<i>Villavende v. State</i> , 504 So.2d 455 (Fla. 2d DCA 1987)	9
<i>Wood v. State</i> , 698 So.2d 293 (Fla. 1 st DCA 1997, rev. granted, No. 91333 (Fla. Jan, 1998)	1

Other Authorities Cited

Title 8, U.S.C. § 1101 3

§893.13, Fla. Stat. 2

Rule 3.172(c)(8),
Florida Rules of Criminal Procedure 4

STATEMENT OF THE CASE AND FACTS

This case is an appeal from a summary denial of Petitioner's Motion to Vacate Plea and Sentence and/or Motion for Post-Conviction Relief and/or Petition for Writ of Error Coram Nobis. Petitioner's appeal arose while the same or similar issues were pending before the Third District Court of Appeal in *Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA 1998). The Third District decided the issues adversely to Petitioner in *Peart* and, ultimately, denied relief to Petitioner relying on its decision in *Peart*. *Rubio v. State*, 706 So.2d 957 (Fla. 3d DCA 1998).

In *Peart*, the Third District certified conflict with *Marriott v. State*, 605 So. 2d 985 (Fla. 4th DCA 1992) and *Wood v. State*, 698 So.2d 293 (Fla. 1st DCA 1997, *rev. granted*, No. 91333 (Fla. Jan, 1998)). This Court accepted jurisdiction in *Peart* and that case is pending under Case No. 92,629. The instant Petitioner, recognizing that the issues raised in *Peart* are likely dispositive of those in his case, has sought and received review in this Court.

FACTUAL STATEMENT

Petitioner Dante Rubio entered the United States from Peru with his family when he was 15 years old. He obtained social security and selective service numbers, completed high school and attended Miami-Dade Community College. He married, fathered one child and did well at business. (R.Vol.I, pp.15-16). On July 7, 1982, he was arrested for Possession of Methaqualone, Trafficking (Methaqualone) and DUI. On July 27, the State of Florida opted to file but one charge, Possession of a Controlled Substance, a violation of §893.13, Fla. Stat. The "methaqualone" had turned out to be Valium. (R. Vol. I, p.27).

On September 28, 1982, the Petitioner, represented by counsel, appeared before the Circuit Court to enter a negotiated plea to the charge. Apparently whether the plea would be one of guilty or *nolo contendere* was not addressed in the agreement but was left to the discretion of the court. The Petitioner's counsel stated as follows:

...We're ready to withdraw our previously entered plea of not guilty at this time and would ask the court if the court would consider a *nolo contendere* plea? I do have a problem. The young man is a student attending school. There may be some difficulty in immigration on a guilty plea, so I would respectfully request to tender a plea of no contest and it would be pursuant to the negotiated plea of one year's probation and a withholding of adjudication.

(R. Vol. I, p.31). It was the understanding of all connected and, critically, of Petitioner Rubio, that the resolution of the criminal case would not impact on his future immigration status. The Petitioner was specifically advised that the plea would not adversely impact on his chances of becoming a lawful permanent resident or citizen. (R. Vol. I, p.16). The trial court accepted the plea, withheld adjudication and placed the Petitioner on one year of probation. (R. Vol. I, p.37). Petitioner successfully completed his probation.

Rubio applied for temporary resident status under President Reagan's amnesty program in May of 1988. INS requested follow-up information on the 1982 arrest but Rubio did not receive the request within the applicable time periods and on February 23, 1990 he was advised that his application for residence status was denied. (R. Vol. I, p. 17). Subsequently, in the spring of 1997, Petitioner sought counsel from several immigration lawyers who informed him of the 1996 changes to the immigration laws.¹ Upon receiving this information, Petitioner set about to seek vacation of the instant plea.

¹ Although no INS action is currently pending, it is believed that Petitioner is removable or excludable pursuant to Title 8, U.S.C. § 1101 as the 1982 finding of guilt qualifies as an "aggravated felony." Where the INS finds an aggravated felony, no hardship waivers or other exceptions to exclusion or deportation are available.

In his motion to vacate, the Petitioner argued that the trial court had conducted insufficient inquiry at the time of the plea in 1982 under *Koenig v. State*, 597 So.2d 256 (Fla. 1992)(plea should be set aside where trial court failed to adequately inquire into factual basis for the plea); that the trial court failed to inform the Defendant of the possible immigration consequences of his plea;² that the plea was not voluntary as the Petitioner did not fully understand the effect of the plea due to the affirmative misrepresentations of trial counsel; that trial counsel was ineffective; and that the plea works a manifest injustice. (R. Vol. I, pp.14-24). The motion was denied without evidentiary hearing. Appeal to the District Court followed. That court entered a summary affirmance based entirely on its earlier decision in *Peart. Rubio*, 706 So. 2d at 957.

² Such advisement has been required under Rule 3.172(c)(8) of the Florida Rules of Criminal Procedure since 1988. It was, however, not required under the rules in 1982.

SUMMARY OF ARGUMENT

Petitioner Rubio adopts the summaries of arguments and the arguments contained within the briefs filed in this Court on behalf of the petitioners in *Roan Peart v. State*, Case Number 92,629, and *Victor William Ross*, Case Number 92,653.

ARGUMENT

Petitioners Roan Peart in Case Number 92,629 and Victor William Ross in Case Number 92,653 have collectively raised six (6) issues which have either direct or inferential applicability to the instant Petitioner:

I.

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

II.

WHETHER RULE 3.850'S TWO YEAR PERIOD OF LIMITATIONS SHOULD BE SUPERIMPOSED UPON PETITIONS FOR WRITS OF ERROR *CORAM NOBIS* WHERE SUCH A LIMITATION IS NOT RECOGNIZED BY THE COMMON LAW AND WILL PLACE THE WRIT OUT OF THE REACH OF A LARGE SEGMENT OF THE CLASS OF DEFENDANTS TO WHOM IT IS INTENDED TO PROVIDE RELIEF.

III.

WHETHER A DEFENDANT MUST 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.

Brief of Roan Peart, p. 6, Statement of the Issues.

IV.

[WHETHER] THIS COURT SHOULD, PURSUANT TO IT'S RULEMAKING POWERS, ADOPT A RULE OF CRIMINAL

PROCEDURE ADDRESSING THE ISSUES PRESENTED IN THIS CASE.

V.

[WHETHER] CORAM NOBIS OUGHT TO BE AN AVAILABLE REMEDY FOR AN OUT OF CUSTODY DEFENDANT SEEKING TO WITHDRAW HIS GUILTY PLEA BASED ON A TRIAL COURT'S FAILURE TO ADVISE, OR AFFIRMATIVE MISADVICE, REGARDING THE IMMIGRATION CONSEQUENCES OF THE PLEA.

VI.

[WHETHER] WELL-ESTABLISHED PRINCIPLES OF LAW ALLOWING A DEFENDANT TO WITHDRAW A GUILTY PLEA IN ORDER TO PREVENT MANIFEST INJUSTICE SUPPORT PETITIONER'S REQUEST FOR WILLIAMS³ RELIEF.

Brief of William Ross, pp. 8, 13, 15.

These issues have been, with one exception, adequately briefed by Peart and Ross. Little would be served by repeating the arguments and case citations previously made. Consequently, Petitioner Rubio adopts the issues presented and the arguments made by Petitioners Roan Peart and Victor William Ross.

In addition, Petitioner seeks to address one factual matter that distinguishes his case from those of *Peart* and *Ross* and the legal principles which are applicable to that factual variance. It is clear, after a reading of the plea colloquy in the instant case, that Rubio was advised affirmatively by his counsel that his plea would not affect his future immigration status. This takes the instant case out of the factual scenario of a trial court merely

³ 316 So.2d 267 (Fla. 1975).

failing to warn about immigration consequences. Rather, in this case, the trial court ratified trial counsel's misadvice *sub silentio* by allowing the *nolo contendere* plea after counsel's specific request to avoid "some difficulty in immigration on a guilty plea". (R. Vol. I, p. 31).

As a result, the instant plea was entered based upon affirmative misrepresentations of counsel and the court. This Court has long recognized that misadvice about the consequences of a sentence renders a plea involuntary and subject to withdrawal. *State v. Leroux*, 689 So. 2d 235 (Fla. 1996); *Costello v. State*, 260 So.2d 198 (Fla. 1972); *Brown v. State*, 245 So. 2d 41 (Fla. 1971). Petitioner recognizes that the *failure* of trial counsel to warn of the immigration consequences of a plea does not render the counsel ineffective as these adverse affects are collateral to the plea. *State v. Ginebra*, 511 So.2d 960 (Fla. 1987). However, this Court, in *Ginebra*, left open the question of "positive misadvice from counsel concerning deportation". 511 So. 2d at 962, n.6.

The Second District in *Villavende v. State*, 504 So.2d 455 (Fla. 2d DCA 1987), has noted that affirmative misrepresentations regarding future immigration status could be the basis for withdrawal of a plea:

Bad advice relied upon to his detriment by a criminal defendant may rise to the level of ineffective assistance regardless of whether it relates to matters (such as the direct consequences of a plea) that the court is obligated to discuss with the defendant. See,

e.g., *Ray v. State*, 480 So.2d 228 (Fla. 2d DCA 1985).

Id. at 457. Also see, *Taylor v. State*, 710 So.2d 636 (Fla. 3d DCA 1998). As a result, if this court resolves the timeliness issues and determines that Rubio has timely filed his petition, then clear grounds for withdrawal of the plea exist.

CONCLUSION

For the reasons urged above and presently before the Court in the related cases, the Petitioner requests that the rulings of the lower courts be reversed and that he be allowed to seek withdrawal of the 1982 plea.

Respectfully submitted,

HERSCH & TALISMAN, P.A.
Attorneys for Petitioner
1110 Brickell Avenue
Penthouse One
Miami, Florida 33131
Telephone: (305) 358-0570

RICHARD HERSCH
Florida Bar N^o 305065

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th ay of January,1999, a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished to: Michael J. Neimand, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 and Office of the State Attorney, 1350 Northwest 12th Avenue, Miami, Florida 33136.

RICHARD HERSCH