IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v.

SHARI LACKMAN,

Respondent.

Case No. 94,302
Fourth District Case No. 97-3962
Seventeenth Circuit Case No. 92-7889 CF10
****

ON PETITION FOR CERTIORARI REVIEW
****

INITIAL BRIEF OF PETITIONER

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CASE NO. 94,302
STATE OF FLORIDA v. SHARI LACKMAN

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner certifies that the following persons or entities may have an interest in the outcome of this case:

1. The Honorable Marc H. Gold and Robert W. Tyson, Jr.
   Circuit Court Judges, Seventeenth Judicial Circuit
   (trial judges)

2. Jeanine M. Germanowicz, Assistant Attorney General
   Office of the Attorney General, State of Florida
   Celia M. Terenzio, Bureau Chief, West Palm Beach
   Robert Butterworth, Attorney General
   (appellate counsel for State)

3. J. Scott Raft, Esq., Assistant State Attorney(s),
   Office of the State Attorney, Seventeenth Judicial Circuit
   Michael J. Satz, State Attorney
   (trial counsel for State)

4. Shari Lackman
   (Respondent/Appellee/Defendant)

5. Arnie B. Gruskin, Esq.
   (appellate/trial counsel for Shari Lackman)

6. Harry Solomon, Esq.
   (appellate counsel for Shari Lackman)

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Petitioner herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

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PRELIMINARY STATEMENT

The State of Florida, Petitioner herein, was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The State was the appellant and Respondent, the appellee, in the District Court of Appeal for the State of Florida, Fourth District.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner may also be referred to as “the State."

The following symbols will be used:

R = Record on Appeal

T = Transcript of October 23, 1997 Hearing on Appellee’s Petition for Writ of Error Coram Nobis

SR = Supplemental Record on Appeal

ST = Supplemental Transcript of September 17, 1992 Plea Hearing

STATEMENT OF THE CASE AND FACTS

On May 1, 1992, the State charged Respondent by Information with possession of cocaine on April 15, 1992. (R 11-12). On September 17, 1992, before the Honorable Robert W. Tyson, Jr., Respondent entered a negotiated plea of guilty to these charges (R 13, 17-18, ST 5), where in return for her plea she was to receive a withhold of adjudication and probation for one year. (R 13-16). Paragraph 10 of the plea form signed by Respondent states: "If you are not a U.S. Citizen your plea may subject you to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service" (R 18). Respondent represented on this plea form that she personally read this paragraph, that she understood its meaning, that she had ample time to discuss the matter with her attorney and that she was satisfied with her representation. (R 17-18). She also initialed condition 10 itself. (R 18). Respondent's attorney signed this plea form thereby indicating that he had explained paragraph 10 to Respondent and that she understood its meaning. (R 18). During the plea hearing, Respondent told the trial court that she was thirty years old, that she could read and write, and that she had never been considered mentally ill. (ST 4-5). Respondent also stated that she and her lawyer read and understood all the items in the plea form, that she had signed the form and initialed each condition, and that she had no questions (ST 5-6). The sentencing guidelines score sheet

indicated the trial court could impose any non-state prison sanction, (R 16); however, pursuant to the plea agreement the trial court withheld adjudication and sentenced Respondent to probation (R 13-16, ST 6).

On or about October 6, 1997, Respondent filed a petition for writ of error coram nobis, alleging that, at the time of her plea on September 17, 1991, she was not adequately advised by the trial court of the immigration consequences of this plea, thus, her plea was involuntary (SR). Respondent also stated that she was in federal custody and was scheduled for a deportation hearing due to this plea. (SR). The trial court held a hearing on Respondent's petition on October 23, 1997, before the Honorable Marc H. Gold (T 1-9). After hearing argument of counsel, the trial court granted Respondent's petition, (T 8, R 23), and entered an order vacating and setting aside the plea and sentence (R 23). The State filed a timely notice of appeal (R 25).

On appeal, the District Court of Appeal, Fourth District, affirmed the trial court's order on the authority of *Gregersen v. State*, 714 So. 2d 1195 (Fla. 4th DCA 1998), but certified conflict with *Peart v. State*, 705 So. 2d 1059 (Fla. 3rd DCA 1998), *rev. granted*, No.92,629 (Fla. Sept. 14, 1998). The Fourth District's opinion can be found at *State v. Lackman*, 719 So. 2d 964 (Fla. 4th DCA 1998). This Court has since granted review of *Gregersen* in case no. 93,801.

SUMMARY OF THE ARGUMENT

Firstly, the trial court erred in granting Respondent's petition for writ of error coram nobis since this was an inappropriate method of seeking remedy. Secondly, the trial court erred by not imposing a time bar against Respondent's petition for writ of error coram nobis since it was filed more than two years after entry of her plea. Thirdly, the trial court erred in concluding that the prior judge failed to comply with Florida Rule of Criminal Procedure 3.172 because the record clearly shows that Respondent signed a plea form indicating that she was aware that her plea could subject her to deportation, and the trial court confirmed on the record that Respondent had in fact read the plea form and understood it. As a result, Respondent also demonstrated no actual prejudice on this ground. Finally, Respondent failed to adduce any proof that she would have likely been acquitted had she proceeded to trial, thus there was no clear showing of prejudice on this ground as well. As a result, the trial court erred in granting her relief in the absence of a showing of prejudice. The Fourth District erred in affirming the trial court's errors.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S PETITION FOR WRIT OF ERROR CORAM NOBIS AND THE FOURTH DISTRICT ERRED IN AFFIRMING THE TRIAL COURT.

The trial court erred in granting Respondent's petition for writ of error coram nobis for a number of reasons; thus, the Fourth District erred in affirming the trial court. Respondent's petition for writ of error coram nobis was an inappropriate method of seeking relief; was untimely filed; and failed to allege or demonstrate actual prejudice resulting from the supposed error.

Respondent used an inappropriate avenue to seek relief from the trial judge's alleged failure to advise her of the deportation consequences of her plea; a petition for writ of error coram nobis. As this Court held, in *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979), *overruled on other grounds*, *Jones v. State*, 591 So. 2d 911 (Fla. 1992), "[t]he function of a writ of error coram nobis is to correct errors of fact, not errors of law." The State submits that, contrary to the stated opinion of the District Court of Appeal, Fourth District, (hereinafter "the Fourth District"), the alleged error in this case is an error of law and not a error of fact.

In *Gregersen v. State*, 714 So. 2d 1195 (Fla. 4th DCA), *rev. granted*, No. 93,801 (Fla. December 3, 1998), in addressing the trial court's failure to inform a defendant of the deportation consequences of a plea, the Fourth District expressly held that

this was an error of fact and not an error of law. The *Gregersen* court based their opinion on *Nickels v. State*, 86 Fla. 208, 98 So. 502 (Fla. 1923). The Fourth District stated that the Florida Supreme Court, in addressing the defendant's attempt to set aside a guilty plea through a writ of coram nobis, had held that a plea of guilty entered through fear or coercion was an error of fact not an error of law. The *Gregersen* court characterized the facts in *Gregersen* as involving an involuntary plea, analogized the case to the *Nickels* case, and arrived at the conclusion that the involuntary plea in *Gregersen* was an error of fact not of law.

The Fourth District's conclusion that Respondent's plea was not voluntary because the trial court failed to inform her of the possible immigration consequences does not withstand close scrutiny. While Petitioner acknowledges that there are cases which hold that the determination of the voluntariness of a plea is a question of fact, Petitioner disputes their 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*, 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, does not automatically mean an error of fact can arise

therefrom. 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*, 371 So. 2d at 482. Thus, in a coram nobis proceeding, a defendant is not entitled to relief when a question of fact is determined in his favor; rather, a defendant is entitled to relief upon establishing that the error of fact would have prevented entry of the judgment and sentence 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).

In addition, *Nickels* was an unusual case and one that should be distinguished from the instant case. In *Nickels* the defendant sought to withdraw his guilty plea because it had been forced from him by well grounded fear and imminent danger of mob violence. *Nickels*, 98 So. at 503. This Court held that, under the "extraordinary" circumstances of the case, it was permissible to grant rehearing to determine whether the defendant had in fact plead guilty under such fear or duress. *Nickels*, 98 So. at 505. *Gregersen* does not present similarly extraordinary circumstances of fear or duress and it should not be analogized to *Nickels*.

The Fourth District, in *Gregersen*, certified conflict with *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA), *rev. granted*, No. 92,629 (Fla. September 14, 1998), on this issue. In *Peart*, the District Court of Appeal, Third District, (hereinafter "the Third District"), addressed the issue of whether a writ of coram nobis is available to attack a conviction based on the trial court's failure to apprise defendants of the deportation consequences of their pleas pursuant to Florida Rule of Criminal Procedure 3.172(c). The Third District held that a writ of error coram nobis was not an available remedy since the petitions were bottomed not on an error of fact, but an error of law, "to wit, an irregularity in [the defendants'] plea colloquy rendering their pleas involuntary." *Peart*, 705 So. 2d at 1062. The State contends that the Third District was correct and that Respondent's petition should have been dismissed based on this ground alone.

Error coram nobis also does not lie where a petitioner has another remedy. *Sullivan v. State*, 18 So. 2d 163 (Fla. 1944)(the writ did not lie to give relief to an irregularity arising in connection with a petit juror's disqualification even though the defendant did not discover the error until after the time had passed for a new trial); *Vonia v. State*, 680 So. 2d 438 (Fla. 2d DCA 1996)(writ could not be used to collaterally attack a defendant's expired sentence where the defendant had not sought post conviction relief so that defendant's claim would have been

procedurally barred even if the defendant had still been incarcerated on the conviction being attacked). This means that a petitioner seeking coram nobis relief must never have had a remedy at all; it does not mean that the petitioner could seek coram nobis relief because the once available remedy was now time barred.

Here, Respondent could have filed a Florida Rule of Criminal Procedure 3.850 motion within two years of the time her judgment and sentence became final. After all, post conviction relief is available for defendants who are placed on probation. *Peart*, 705 So. 2d at 1062, *citing, State v. Bolyea*, 520 So. 2d 562 (Fla. 1988) (court-ordered probation constitutes custody for 3.850 purposes). The fact that a judge did not specifically inform Petitioner orally of the deportation consequences of her plea is clearly something that was known to Petitioner or Petitioner's counsel or could have been ascertained through due diligence within two years of the entry of the plea. The failure to timely use a remedy which exists does not equate in seriousness to the complete absence of a remedy. Once again, the State submits that a petition for writ of error coram nobis was an inappropriate remedy in this case.

Even if a petition for a writ of error coram nobis was the correct procedural vehicle to bring Respondent's claim, the trial court and the Fourth District erred in not dismissing Respondent's petition since the petition was untimely filed. A petition for a writ of error coram nobis raising an Rule 3.172 issue is, for those

no longer in custody, the functional equivalent of a motion for post conviction relief under Rule 3.850. *Wood v. State*, 698 So. 2d 293 (Fla. 1st DCA 1997), *rev. granted*, 705 So. 2d 571 (Fla. 1998). The Fourth District, in fact, conceded this very point in *State v. Taylor*, No. 98-0698 (Fla. 4th DCA December 2, 1998), a case in which the district court found that laches had arisen solely by virtue of failing to satisfy the two year time limit under Rule 3.850(b).

Rule 3.850(b) imposes a time limitation for filing of two years after the judgment and sentence become final in a noncapital case unless the motion alleges that the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence. Because, in these cases, a petition for writ of error coram nobis functions in a manner similar to a Rule 3.850 motion, the petition must also satisfy the two year time limitation imposed on a Rule 3.850 motion. *Wood*, 698 So. 2d at 294; *Peart*, 705 So. 2d at 1062 (these claims are not founded on newly discovered evidence and must therefore be brought within two years after judgement and sentence become final); *Garcia*, 571 So. 2d at 38(in order to qualify for relief by way of petition for error coram nobis, petitioner must show that facts forming basis of her claim were not known by her or her counsel and could not have been discovered by the exercise of due diligence).

Where a motion for post-conviction relief is not timely filed and the movant fails to show that facts upon which her claim is predicated were unknown and could not have been ascertained by the exercise of due diligence, movant is not entitled to relief. *Paez v. State*, 512 So. 2d 263 (Fla. 3d DCA 1987). Here, Respondent pled guilty on September 17, 1992 and Respondent was ordered to complete one year of probation yet Respondent did not file her petition until on or about October 6, 1997. Clearly, Respondent filed her petition well after the two year time limitation had expired.

Further, Respondent's petition did not allege that the facts on which the claim was predicated were unknown to her or her attorney and could not have been ascertained by the exercise of due diligence. Nor could it so allege. Again, the fact that the trial judge did not expressly read condition 10 out loud to Respondent is not a fact that was unknown or could not have been discovered without due diligence within two years of the plea. Respondent's petition should have been barred on the ground that it was untimely.

The State can offer no explanation for the fact that this argument was duly raised below in the instant case but disregarded by the Fourth District since, less than a month and a half later, the Fourth District used this very rationale to reverse an order granting a petition for writ of error coram nobis. The Fourth District inexplicably reached contradictory results in *Taylor* and

in the instant case based on a similar set of facts. The State urges this Court to resolve the conflict and correct the Fourth District's error on this ground by finding that the time bar should also have been applied in this case.

The trial court also erred in granting Respondent's motion in that Respondent failed to show the prejudice necessary to withdraw her plea and gain relief under Rule 3.172. The Fourth District correspondingly erred in affirming the trial court's error. Rule 3.172(i) makes it quite clear that the failure of the trial court to follow the procedures outlined in Rule 3.172, including informing a defendant that she may be subject to deportation, will not render a plea void absent a showing that Respondent was prejudiced **in fact** because the required information was not made available to her (emphasis supplied). Fla. R. Crim. P. 3.172(i); *Simmons v. State*, 489 So. 2d 43 (Fla. 4th DCA 1986). After all, an attempt to withdraw a plea after it has been accepted by the trial court is not favored, and a defendant is required to show clear prejudice or that a manifest injustice has occurred. *Williams v. State*, 316 So. 2d 267 (Fla. 1975); *Adler v. State*, 382 So. 2d 1298 (Fla. 3d DCA 1980).

Furthermore in *Wuornos v. State*, 676 So. 2d 966 (Fla.), *cert. denied*, 117 S. Ct. 395 (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). "[I]t 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 Fourth District, in *Perriello v. State*, 684 So. 2d 258 (Fla. 4th DCA 1996), interpreted its opinion in *Marriott v. State*, 605 So. 2d 985 (Fla. 4th DCA 1992), as holding that the mere threat

of deportation alone was a sufficient showing of prejudice to render the plea void pursuant to Rule 3.172(i). *See also, De Abreau v. State*, 593 So. 2d 233 (Fla. 1st DCA 1992), *rev. dismissed*, 613 So. 2d 453 (Fla. 1993). However, in *Peart*, 705 So. 2d at 1063, the Third District Court of Appeal indicated that a proper showing of prejudice would necessitate not only an assertion that the defendant would not have entered into the plea but, in addition, an assertion that had the defendant gone to trial, they most probably would have been acquitted. The Third District certified conflict with *Marriott* on this ground. The State submits that this Court should adopt the Third District's analysis in *Peart* rather than the Fourth District's analysis in *Marriott* on this issue.

As the Third District noted, "[t]o 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." *Peart*, 705 So. 2d at 1063-64. This Court should avoid this absurd result by taking this opportunity to expressly require defendants to make a showing that had they declined the plea offer and gone to trial, they most probably would have been acquitted.

Here, Respondent made no such assertion below; thus, Respondent failed to show the necessary prejudice. As a result, the trial court erred in granting the petition and the Fourth District

should not have affirmed the trial court's error.

The trial court and the Fourth District also erred in concluding from the record that the prior judge failed to comply with Rule 3.172, and that Respondent therefore should be allowed to withdraw her plea. The Fourth District, in *Hen Lin Lu v. State*, 683 So. 2d 1110, 1111 (Fla. 4th DCA 1996), held that "[a]lthough rule 3.172(c) requires a trial judge to verbally engage a defendant who seeks to enter a plea, nothing in the rule prevents a court from using preprinted forms to assist in imparting the information required by the rule." The Fourth District further stated that "a judge using a preprinted rights form as part of a plea colloquy must orally verify that the defendant has intelligently consumed the written information contained within it." *Hen Lin Liu*, 683 So. 2d at 1112.

Here, Respondent signed a plea form and initialed the very condition under which Respondent specifically acknowledged that she understood that her plea could subject her to deportation. (R 17-18). Coupled with this, during the plea colloquy, the trial court confirmed on the record that Respondent was thirty years old, could read and write, had read the plea form with her attorney and understood it, and had initialed and signed the form. (ST 4-5). The trial court and the Fourth District should have found these facts sufficient to show the trial court's compliance with this rule as well as Respondent's failure to demonstrate actual prejudice

resulting from the trial court's actions.

Marriott, 605 So. 2d at 985, and *Perriello*, 684 So. 2d at 258, are both factually distinguishable from the case at bar. In *Marriott*, the defendant was not appraised by either defense counsel or the judge about the possibility of deportation. In *Perriello*, the defendant testified that his English language comprehension was not very good at the time of the plea. Nothing in either record, contrary to the record at bar, suggested that these defendants understood the contents of the form or had any knowledge of the possible consequences of their pleas. Here, Respondent was not, in fact, actually prejudiced.

Based on this reason as well on all the other reasons adduced above, this Court should reverse the trial court's order granting Respondent's petition for writ of error coram nobis and the Fourth District's opinion affirming the trial court's error.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, the State respectfully requests that this Honorable Court **REVERSE** the Fourth District's opinion affirming the trial court's order granting the petition for writ of error coram nobis and reinstate Respondent's plea of guilty, withheld adjudication, and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the initial brief, complete with appendix, has been furnished by U.S. Mail to Harry M. Solomon, Esq., 799 Brickell Plaza, Suite 606, Miami,

Florida, 33131 on April 27, 2000.

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Of Counsel

APPENDIX