IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,615
DCA NO. 98-2601

EDWIN SCOTT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF ON THE MERITS OF EDWIN SCOTT

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INTRODUCTION

Throughout this brief the appellant will be referred to as the defendant, and the State of Florida, the appellee here, will be referred to as the State. "R. ___" refers to the record on appeal. "P-TR.___" refers to the transcript of the plea proceeding on November 5, 1990. "CN-TR.___" refers to the hearing on the Petition for Writ of Error Coram Nobis on September 2, 1998. "SR.___" refers to the supplemental record.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND AND COURSE OF PROCEEDINGS BELOW.

1. The Underlying Arrests.

The petitioner was arrested on July 26, 1989, under the name Edwin Scott, in connection with the sale of two pieces of cocaine rock to an undercover police officer in exchange for $10.00. (R.3, 15.) On August 16, 1989, an information was filed by the State of Florida charging the petitioner with a second degree felony in violation of 893.13 Fla. Stat. (case no. 89-28895). (R.1) On September 28, 1989, an alias capias was issued for the petitioner's failure to appear in court for the arraignment. (R.3)

On September 8, 1990, the petitioner was again arrested under the name Jonathan Erickson in Miami for selling a $10 piece of rock cocaine to an undercover detective. (SR.1) (R.15) On September 28, 1990, a two-count information was filed against the petitioner charging him with possession of cocaine, a third degree felony, in violation of 893.13(1)(f) and selling cocaine, a second degree felony, in violation of 893.13(1)(a) (case no. 90-36492). (SR.3) On September 11, 1990, the petitioner was held in contempt of court for his failure to appear one year earlier for his arraignment in case no. 89-288995. (R.6) On October 2, 1990, the petitioner was arraigned in case no. 93-36492. (SR.1)

2. The Plea Before the Trial Court.

On November 5, 1990, the petitioner appeared before Circuit Court Judge Arthur I. Snyder for a plea. (P-TR.27-33) According to the transcript of the petitioner's appearance, the trial court adjudicated the petitioner guilty as to both case numbers 89-28895 and 90-36492, and the Court imposed a sentence of two and one half years with credit for time served for 60 days. (*Id.*) The Court eliminated the balance of the contempt sentence entered on September 11, 1990. (*Id.* 30-31) The record contains a Sentencing Guidelines worksheet indicating a sentencing range of two and one half years to three and one half years. (R.11) The record of this plea proceeding follows:

The Court: Does he want the plea or not?

Mr. Payne,
Counsel for the Defendant:

Yes, sir.

The Court: Swear the witness.

The Court: Counsel waive PSI, stipulate the Information if proved by the State would constitute a prima facie case?

Mr. Payne: Yes, sir.

The Court: What is your name, sir?

The Defendant: Jonathan Erickson.

The Court: Are you satisfied with your lawyer?

The Defendant: Yes.

The Court: Anybody threaten you in any way or promise you anything in order to get you to enter this plea?

The Defendant: No.

The Court: Are you under the influence of any drugs or alcohol today?

The Defendant: No, I'm not.

The Court: Are you under the care of a psychiatrist or have any kind of mental problem?

The Defendant: No, sir.

The Court: You understand that you're giving up your right to a trial by jury, your right to remain silent, your right to call witnesses on your behalf and also your right to an appeal?

The Defendant: Yes, sir.

The Court: The Court finds the defendant has freely and voluntarily entered the plea. The plea protects the interest of the State of Florida and the defendant is represented by good and competent counsel.

Therefore, in case number 89 -28895B, State of Florida versus Edwin Scott, based upon the stipulation and plea, the Court will find the defendant guilty of sale of cocaine.

The Court will enter a finding of guilt, adjudicate the defendant guilty, sentence the defendant to two and a half years state penitentiary, credit for time served.

Vacate the balance of the contempt.

In case number 90-36492, State of Florida versus Jonathan Erickson, based upon the stipulation and plea, there is sufficient evidence to

> find the defendant guilty of possession of cocaine, sale of cocaine and obstruction by giving false information.
>
> The Court will enter findings of guilt, adjudicate the defendant guilty, suspend the entry of sentence on the possession of cocaine.
>
> On the sale, sentence the defendant to two and half years state penitentiary, to run concurrent with the sentence in 89-28895B.
>
> Have the defendant fingerprinted in both cases, please.
>
> Have the defendant shipped up to Palm Beach County or whatever he's supposed to be.
>
> Okay. That completes the calendar that I know of. Anybody else?
>
> Let the record reflect that Edwin Scott, also known as Jonathan Erickson was fingerprinted in open court and the Court is signing an order to that effect.

(P-TR.29-32) The trial court imposed a sentence of two and one half years, which was within the Guidelines Range. The sentence imposed in case number 90-36492 ran concurrent with the sentence imposed in 89-28895. (SR.10).

3. Petition for Writ of Error Coram Nobis.

On December 30, 1997, the petitioner filed a petition for writ of error coram nobis seeking to vacate the judgment in both cases because the trial court's plea colloquy failed to comply with the procedure set forth in Fla. R. Crim. P. 3.172, thus resulting in a plea that was not entered voluntarily or intelligently as to both cases. (R.14) As to both cases, the trial court failed to address the petitioner personally regarding the nature of the charges to which the petitioner was pleading, the minimum or maximum penalty, the terms of any plea agreement, and the court failed to determine whether a factual basis for the plea existed. Rule 3.172(c)(1)(7). (R.21-22; P-TR.29-30.) In his petition, the petitioner asserted that he was not aware that his plea would result in the adjudication of both cases. (R.22)

Following a non-evidentiary hearing, Circuit Court Judge Alex Ferrer denied the petition and entered a written order, relying upon *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA 1998), *review granted*, 722 So. 2d 193 (Fla. Sept. 1998). (CN-TR 47-64) (R.38-39) The court ruled that coram nobis relief was not available to the petitioner as a remedy for a violation of rule 3.172. The trial court found that under *Peart* the petitioner could only challenge the plea under Fla. R. Crim. P. 3.850. Because the two-year limitations period under Rule 3.850 had run, the court found that the petitioner was "seeking to circumvent that limit by coral nobis." (R.39) The Third District Court of

Appeals affirmed the trial court's decision relying on its decision in *Peart v. State*, *supra*, as well as the decisions in *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989), and *Russ v. State*, 95 So. 2d 594 (Fla. 1957).

B. SUMMARY OF THE ARGUMENT

On November 5, 1990, the trial court adjudicated the petitioner as to both felony cases without following the requirements of Fla. R. Crim. P. 3.172 and the petitioner was not fully aware of the fact that he was pleading guilty to two cases, thus resulting in an error of fact. The petitioner filed a petition for a writ of error coram nobis on December 30, 1997, seeking to vacate the judgment as to both cases. Relying upon the decision in *Peart v. State*, 705 So. 2d 1059 (3d DCA 1998), *review granted*, 722 So. 2d 193 (Fla. Sept. 14, 1998), the court below denied the petition for writ of error coram nobis. The *Peart* decision is currently under review by this Court. Because the failure to comply with Rule 3.172 is an issue of fact, the coram nobis relief should have been available to the petitioner.

This Court held in *Wood v. State*, ___ So. 2d ___, 1999 WL 334750 (Fla. May 27, 1999), that the two-year time limitation under Rule 3.850 would also apply to petitions for writ of error coram nobis. The Court found that the writ of error coram nobis and Rule 3.850 are intended to serve the same purpose. The Court also found that the decision in *Wood* applies to all defendants adjudicated prior to the opinion. Therefore, the petitioner would have the right to move to vacate his plea pursuant to Rule 3.850.

C. ARGUMENT

ISSUE I

CORAM NOBIS RELIEF IS AVAILABLE TO PETITIONER SEEKING TO VACATE HIS FELONY CONVICTIONS BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.172, AND THE PETITIONER'S PLEA WAS NOT ENTERED INTELLIGENTLY AND KNOWINGLY.

The function of a writ of error coram nobis is to correct fundamental errors of fact which were unknown to the trial court or the petitioner and if known would have prevented entry of the judgment. *Malcolm v. State*, 605 So. 2d 945, 947 (Fla. 3d DCA 1992) (holding that to be legally sufficient, the petition for a writ of error coram nobis must allege specific facts of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment and sentence attacked."). *See also Ex parte Wells*, 53 So. 2d 708, 711 (Fla. 1951) ("[W]e held the function of coram nobis was to bring to the attention of the court some specific fact or facts then existing but not shown by the record and not known to the court or the party or

counsel at the trial, and being of such vital nature that if known to the court would have prevented the rendition of the judgment assailed.”).

By failing to comply with the requirements of Fla. R. Crim. P. 3.172, the trial court did not insure that the petitioner’s plea as to both cases was entered intelligently and voluntarily.[1] The court never questioned the petitioner concerning the nature of either

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[1] Fla. R. Crim. P. 3.172 states in part:

> (a) Voluntariness; Factual Basis. Before accepting a plea of guilty or nolo contendere, the trial judge shall be satisfied that the plea is voluntarily entered and that there is a factual basis for it. Counsel for the Prosecution and the defense shall assist the trial judge in this function.
>
> * * *
>
> (c) Determination of Voluntariness. Except when 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 or she understands:
>
> > (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law;
> >
> > * * *
> >
> > (7) the complete terms of any plea agreement including specifically all obligations the

of the charges, the minimum or maximum penalty he could have faced, or the terms of any plea agreement. Essentially, the trial court never even advised the petitioner that his plea involved both pending cases. Only after the court finished addressing the petitioner at the end of the hearing did the court announce the petitioner's guilt as to both cases.

In *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA), *review granted*, 722 So. 2d 193 (Fla. Sept. 14, 1998), the Third District Court ruled that the defendant was not entitled to coram nobis relief because the "irregularity" in the plea colloquy was an error of law and not an error of fact. *Id.* at 1062 (citing *Malcolm v. State,* 605 So. 2d 945 (Fla. 3d DCA 1992). *Cf. Gregerson v. State*, 714 So. 2d 1195 (Fla. 4th DCA 1998) (holding that the failure to advise the defendant of the immigration consequences of a plea was an error in fact and subject to coram nobis relief). The defendants in *Peart* sought coram nobis relief on the grounds that the trial court failed to inform the defendants of the deportation consequences of their respective pleas, as required by Fla. R. Crim. P. 3.172(c)(8).

As in *Peart*, the issue here is whether the writ of error coram nobis is the proper vehicle for challenging a conviction based on the trial court's failure to follow a provision of Rule 3.172. In *Peart,* the defendants sought to vacate their plea under coram nobis on the basis that they were not informed of the deportation consequences of their plea as

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defendant will incur as a result;

required by Rule 3.172(c)(8). Thus, the defendants in *Peart* argued that coram nobis was the proper means for challenging a plea that was entered involuntarily. *Id.* at 1061. Though the Rule 3.172 defect in the present case did not involve the immigration consequences of the plea, the colloquy here fell substantially short of that which was required. Indeed, the trial judge, which was not the same judge that adjudicated the petitioner, conceded that, the "judge's plea colloquy was not a 'text book example' of the inquiry required before a plea is accepted." (R.39) In fact, the failure here was even more fundamental because it was a failure to complete an essential portion of the plea colloquy required by 3.172.

Relying upon *Peart,* however, the trial court found that coram nobis relief was not available for a violation of Rule 3.172.[2] Whether coram nobis relief is available to vacate the involuntary plea of a defendant who later discovers the full consequence of his plea has been fully briefed by *Peart*. (Case no. 92,629) Consequently, the petitioner adopts those arguments as they relate to the present case. Nevertheless, the failure of the trial court to comply with Rule 3.172 in the present case rendered the plea involuntary. The error here is one of fact and should also be subject to coram nobis relief.

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[2] Twelve days after the Trial Court entered the order denying the writ of error coram nobis, this Court granted review in *Peart v. State*.

Unaware of this consequence, the petitioner was unable to enter into a plea knowingly and intelligently with full awareness of its consequences. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (finding that the record of a guilty plea must show that the defendant voluntarily and knowingly entered the plea). The due process clause of the Fifth Amendment of the Constitution requires that in accepting a guilty plea the trial court must carefully inquire into the defendant's understanding of the plea "so that the record contains an affirmative showing that the plea was intelligent and voluntary." *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992), *see also Boykin v. Alabama*, 89 S. Ct. 1709 (holding that the record of a guilty plea must show that the defendant voluntarily and knowingly entered the plea).

Rule 3.172 of the Florida Rules of Criminal Procedure sets forth the procedure for accepting a guilty plea and requires that a trial judge address the defendant personally and determine that he understands (1) the nature of the charge to which the plea is offered, (2) the mandatory minimum penalty provided by law, if any, and (3) the maximum possible penalty provided. Rule 3.172(c)(1). None of these steps were followed here. The rule also requires that in addressing the defendant the trial court must determine that the defendant understands, "the complete terms of any plea agreement including specifically all obligations the defendant will incur as a result..." Rule 3.172(c)(7). This also was not done.

Courts have vacated convictions resulting from guilty pleas for other serious deficiencies in the Rule 3.172 procedure where there is an indication that the plea is not made voluntarily and intelligently. *See Ashley v. State*, 614 So. 2d 486 (Fla. 1993) (a court must determine on the record that a defendant is aware of the maximum possible penalty that may be imposed); *Byrd v. State*, 643 So. 2d 1209 (Fla. 1st DCA 1994) (the defendant permitted to withdraw a plea where the trial court failed to determine that the defendant was aware of the minimum and maximum penalty), and *Watson v. State*, 667 So. 2d 242, 246 (Fla. 1st DCA 1995) (the "brief colloquy" between the trial court and the defendant addressed none of the matters listed in Rule 3.172(c)). Because the record indicated that the petitioner's plea was not entered intelligently and voluntarily, it should be subject to coram nobis relief. The issue presented by the petitioner was one of fact and the trial court erred in denying the Petition based on the decision in *Peart v. State*.

ISSUE II

UNDER THIS COURT'S RECENT DECISION IN *WOOD v. STATE,* THE 3.850 TWO-YEAR TIME LIMITATION DOES NOT APPLY TO THE PETITIONER'S CONVICTION, AND THE PETITIONER WOULD BE ELIGIBLE TO CHALLENGE HIS PLEA UNDER 3.850.

The trial court found that the petitioner could not challenge the plea under Rule 3.850 because the two year limitation under 3.850(b) had expired and found that the coram nobis petition was an attempt to "circumvent that limit by coram nobis, something the law will not allow." (R.39) Under this Court's decision in *Wood v. State*, ___ So. 2d ___, 1999 WL 334750 (Fla. May 27, 1999), the defendant could apply for relief under Rule 3.850 for up to two years from the date of the ruling. In *Wood,* the defendant challenged a 1988 conviction for reckless driving and possession of cocaine following his federal conviction for drug charges ten years later in 1998. While in federal prison, Wood filed for coram nobis relief rather than Rule 3.850 relief, because he had completed his sentence.

In *Wood*, this Court observed that Rule 3.850 was patterned after the writ of error coram nobis and largely supplanted the writ for defendants in custody. *Id*. The Court

imposed the two-year limitation upon the writ "given the similarity of purpose" between the rule and the writ and held that the time limits of Rule 3.850 shall be applicable to petitions for writ of error coram nobis. *See also Bartz v. State*, ___ So. 2d ___, 1999 WL 674537 (Fla. 3d DCA Sept. 1999) (finding that the defendant's motion to vacate a 1977 sentence would be considered as a Rule 3.850 claim under *Wood*).

The court in *Bartz* denied the defendant relief on the grounds that the motion was barred by the doctrine of laches and the court found the motion failed on the merits. Nevertheless, under this ruling, a motion to vacate his plea under Rule 3.850 would be available to the petitioner. It was not available at the time the petition sought relief under coram nobis. Should this Court find that coram nobis relief is not available, the matter should be remanded to allow the defendant to seek relief pursuant to Rule 3.850.

CONCLUSION

Based upon the foregoing argument and citations of authority, the petitioner respectfully requests that the Court remand the matter to the trial court with specific directions to grant the petitioner's writ of error coram nobis and vacate the defendant's conviction. Alternatively, the petitioner respectfully requests that the matter be remanded to allow the petitioner to seek relief pursuant to Rule 3.850.

STATEMENT AS TO BRIEF PREPARATION

Undersigned certifies that this brief has been prepared in proportionately spaced 14 point Times New Roman type and size.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this ___ day of September, 1999, upon Mike Neimand, Assistant Attorney General, Office of the Attorney General, Criminal Division, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, FL 33301.

____
Kenneth M. Swartz

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