IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,975

VAN TUYN, SABINA MARIA,

Petitioner,

-versus-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS OF SABINA MARIA VAN TUYN

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INTRODUCTION

Petitioner, Sabina Maria Van Tuyn, was the defendant/petitioner in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Respondent, State of Florida, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. The parties will be referred to as they stood in the trial court. References to the attached Appendix will be by the letters "App". References to the Record on Appeal will be by the letter "R". All emphasis is added unless otherwise indicated.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in Times New Romans 14.

STATEMENT OF THE CASE AND FACTS

The jurisdiction of this Honorable Court is invoked pursuant to Rule 9.030(a)(2)(IV) as the revised opinion of the Third District Court of Appeal in this case has certified conflict with the opinion of the Fourth District Court of Appeal in *Gregersen v. State*, 714 So.2d 1195 (Fla. 4th DCA 1998), review granted 728 So.2d 205 (Fla. 1998).

Ms. Van Tuyn, a Dutch citizen, is a long time resident alien of the United States (R. 70, R. 76). On November 19th, 1986 she was charged by Information with the offense of failure to return collateral security in violation of F.S. §648.442 and grand theft in violation of F.S. §812.014 (R. 1-3). On March 28th, 1988, while represented by court appointed Special Assistant Public Defender Michael Matters, Ms. Van Tuyn entered a plea of *nolo contendere* to the charges and was placed on probation/community control with the special condition that she make restitution in the amount of $11,000.00. She

subsequently paid the restitution and her probation/community control was terminated on March 10th, 1992 (R. 54).

On December 26th, 1995 the Immigration and Naturalization Service confiscated Ms. Van Tuyn's "green card" [alien registration card] and passport (R. 77) and in 1997 undertook to deport her based upon her plea in this case (R. 71). Shortly thereafter Ms. Van Tuyn filed her Sworn Petition for Writ of Error *Coram Nobis* (R. 56-59) and Sworn Amended Petition for Writ of *Coram Nobis* (R. 70-73).

On November 25th, 1997 an evidentiary hearing was held before the Honorable Robert N. Scola, Jr., Judge of the Circuit Court (R. 76-80). Ms. Van Tuyn alleged and proved that prior to her plea she had told her court appointed counsel that she was not a citizen of the United States and that she was specifically advised by him that her plea would not subject her to deportation. Moreover, the record and testimony reflects that Ms. Van Tuyn's trial counsel never made a request for Judicial Recommendation against Deportation (R. 77). Ms. Van Tuyn's trial counsel testified that he does no immigration work,

that although he has represented non-citizen defendants, he did not know at the time of Ms. Van Tuyn's pleas which charges would result in deportation. Ms. Van Tuyn's uncontroverted testimony was that the trial Judge did not advise her that her plea could subject her to deportation[1].

Ms. Van Tuyn asserted and testified that if she had not been affirmatively misadvised by trial counsel, she would not have entered a plea but would have proceeded to trial where she would have been found not guilty upon the evidence. She further asserted that she could not have ascertained the facts regarding her plea and its effects by the exercise of due diligence prior thereto, beyond seeking the advice of appointed counsel and that under these circumstances her plea was neither voluntary nor knowing and she requested Judge Scola to grant her Petition and vacate her plea. The trial court did so (R.

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[1] Fla.R.Cr.P.172(c)(8), effective January 1st, 1989, was not applicable at the time of the plea, nor was it the basis of Appellant's Petition.

75). The same Order which vacated the judgment and sentence also set the cause for "hearing" on March 20th, 1998. That Order was not appealed.

On February 18th, 1998 the Third District Court of Appeal filed its *en banc* opinion in the case of ***Peart v. State***, et. al, 705 So.2d 1059 (Fla. 3d DCA 1998) which is pending review by this Honorable Court as of the date of the service of this brief.

By the March 20th, 1998 hearing, the State had neither served nor filed a Motion for Rehearing; however, at that hearing, in response to Ms. Van Tuyn's drawing the court's attention to the absence of any such motion, the State stated that it had "filed [sic] an oral motion for rehearing" (T. 4) which was then summarily granted by the trial court "without prejudice" (R. 4) on the basis of ***Peart***. From the court's granting of that Motion for Rehearing and its reversal of the Order Vacating the Judgment and Sentence in this Ms. Van Tuyn appealed to the District Court of Appeal, Third District.

The Third District Court of Appeal affirmed the trial court's reversal of the Order Vacating Judgment and Sentence. Ms. Van Tuyn timely filed a

Motion for Rehearing following which the District Court of Appeal filed a Revised Opinion which certificated conflict in this case with *Gregersen v. State*, 714 So.2d 1195 (Fla. 4th DCA 1998), review granted, 728 So.2d 205 (Fla. 1998).

Ms. Van Tuyn timely filed her Notice To Invoke Discretionary Jurisdiction to invoke the discretionary jurisdiction of this Honorable Court.

This review follows.

QUESTION PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN GRANTING A REHEARING AND VACATING ITS EARLIER ESTABLISHED ORDER GRANTING MS. VAN TUYN'S PETITION FOR WRIT OF ERROR *CORAM NOBIS*?

II

WHETHER THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR REHEARING AFTER CORRECTLY GRANTING APPELLANT'S PETITION FOR WRIT OF ERROR *CORAM NOBIS* AND VACATING THE JUDGMENT AND SENTENCE?

SUMMARY OF THE ARGUMENT

On December 11th, 1997, the Order Vacating the Finding of Ms. Van Tuyn's Guilt was filed. No Motion for Rehearing was filed. No appeal was taken. That Order, therefore, became final. The subsequent Order, of April 9th, 1998 seeking to vacate the prior Order was after the prior Order became final and, itself, was not entered Nunc Pro Tunc. The Order filed December 11th, 1997 should be accepted as final as it was not timely and validly challanged.

Ms. Van Tuyn submits that her original plea was entered through the affirmative misadvice of her attorney that she would not be subject to deportation as a result of that plea. It was, thus, an involuntary plea and is an error of fact such as is cognizable through a Writ of Error *Coram Nobis*. See, *Nickels v. State*, 98 So.502 (Fla. 1923); *Gregerson v. State*, 714 So.2d 1195 (Fla. 4th DCA 1998).

ARGUMENT

I

THE TRIAL COURT ERRED IN GRANTING A REHEARING AND VACATING ITS EARLIER ESTABLISHED ORDER GRANTING MS. VAN TUYN'S PETITION FOR WRIT OF ERROR *CORAM NOBIS*

The Order Vacating the finding of Ms. Van Tuyn's Guilt was filed December 11th, 1997 (R. 99).

The Record does not reflect that the State ever appealed this Order.

The Record does not reflect that a Motion for Rehearing was ever filed by the State. Ms. Van Tuyn would note that the Rules of Criminal Procedure do not provide for Motions for Rehearing by the State, especially not as to Orders Vacating a Finding of Guilt. Even if the applicable rule of civil procedure providing for the filing of a motion for rehearing within ten (10) days were found to be applicable, the failure of the State to file such a Motion

for Rehearing (none is a matter of Record) requires that the Order Vacating Finding of Guilt stand. See, *Pitts v. State*, 225 So.2d 352 (Fla. 1st DCA 1969).

As the State did not timely appeal the December 11th, 1997 Order and as no timely authorized (by Rule or Statute) Motion for Rehearing was filed as to that Order, that Order became final on January 11th, 1998 and the subsequent attempt to vacate that unappealed order was, submittedly, a nullity. See, also, *Green v. State*, 280 So.2d 701 (Fla. 4th DCA 1973); *Schaffer v. State*, 296 So.2d 569 (Fla. 3d DCA 1974).

As the December 11th, 1997 Order was neither properly nor timely "attacked", it must stand. This Honorable Court should affirm the December 11th, 1997 Order Vacating Finding of Guilt.

II

THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR REHEARING AFTER CORRECTLY GRANTING APPELLANT'S PETITION FOR WRIT OF ERROR *CORAM NOBIS* AND VACATING THE JUDGMENT AND SENTENCE

The Record reflects that at the time Ms. Van Tuyn entered her plea she was advised by her court-appointed counsel that her plea would <u>not</u> subject her to deportation (R. 57, 71, 76).

Given this advice, she entered a plea of convenience to three (3) years probation, a withhold of adjudication and restitution (R. 11).

Years later, after her sentence had been served, she came to find that this plea of convenience had returned to haunt her and, contrary to

advice/misadvice of her court-appointed attorney, it did subject her to deportation.

A Petition for Writ of Error *Coram Nobis* is the remedy available to defendants challanging the validity of sentences for which they are no longer in custody. See, *Howarth v. State*, 673 So.2d 580 (Fla. 5th DCA 1996).

A Petition for Writ of Error *Coram Nobis* is used to bring to the attention of the court facts, that, if known at the time judgment was rendered, would have prevented rendition of the judgment. See, *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998).

If a plea of guilty is rendered under circumstances making the judgment on the plea illegal, the remedy is by writ of error *coram nobis*. See, *House v. State*, 172 So. 734 (Fla. 1937). See, also, *La Rocca v. State*, 151 So.2d 64 (Fla. 2d DCA 1963).

In *Gregerson v. State*, 714 So.2d 1195 (Fla. 4th DCA 1998), the Fourth District Court of Appeal found that a plea which was entered when that defendant was not informed that her adjudication would have an adverse effect

on her status as a resident alien was an involuntary plea and an error of fact reviewable by means of a writ of *coram nobis*. See, also, *McEwan v. State*, 24 Fla.L.Weekly D1038 (Fla. 4th DCA 1999).

Petitioner urges this Honorable Court to adopt *Gregersen* and find that an involuntary plea is an error of fact reviewable by writ of error *coram nobis*.

Petitioner would note that the advice/misadvice upon which she relied was not only "non advice" from the trial court, but also affirmative misadvice from her own court-appointed attorney!! The closest case on point is, submittedly, *Dugart v. State*, 578 So.2d 789 (Fla. 4th DCA 1991) where the Court held that "affirmative misinformation" from that defendant's public defender about the consequences of his plea would be a basis for relief via writ of error *coram nobis*. Here, too, the "affirmative misinformation" given Ms. Van Tuyn by her court-appointed counsel should allow her relief via writ of error *coram nobis*.

Petitioner cannot help but note that, even in denying relief, the Court in *Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA 1998), stated:

> We believe that persons not in custody should be allowed post-conviction relief for failure of a trial court to advise them of the deportation consequences of their pleas as required by Rule 3.172(c)(8). We recognize that Rule 3.850 does not presently provide these defendants with a remedy. In view of our present holding denying *coram nobis* relief on these cases, we respectfully suggest that the Florida Supreme Court consider whether a rule should be adopted to address the issue of post-conviction relief for persons not in custody, either as a general proposition or as relates specifically to the issue of immigration consequences.
>
> (p. 1063)

Petitioner submits that this Court should adopt the Court's decision in *Gregersen* and allow involuntary pleas such as those in the instant case to be contested by writ of error *coram nobis*.

If this Court should adopt a rule as suggested by the District Court in *Peart*, Petitioner submits that she, by timely raising this issue, should be allowed to litigate under any "new rule".

Lastly, Petitioner would respectfully adopt the arguments of her co-Petitioners who are also before this Court due to the conflict between *Peart* and *Gregersen*.

<u>CONCLUSION</u>

Relying upon the foregoing facts, arguments and authorities, Petitioner respectfully requests this Honorable Court to Reinstate the December 11th, 1997 Order Vacating her Judgment and Sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this day of August, 1999.

Respectfully submitted,

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