ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,044

BOOKER BIRDSONG,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 Northwest 14th Street
Miami, Florida 33125
(305) 545-1961

MARTI ROTHENBERG
Assistant Public Defender
Florida Bar No. 320285

Counsel for Petitioner

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INTRODUCTION

This is the initial brief on the merits of petitioner Booker Birdsong in this petition for discretionary review of the decision of the Third District Court of Appeal dated May 19, 1999, affirming the denial of petitioner's motion for post conviction relief and denying his petition for writ of error coram nobis and petition for writ of mandamus.

Citations to the record are abbreviated as follows:

(A) - Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

The petitioner was charged by information on April 23, 1986, in the Circuit Court of the Eleventh Judicial Circuit, Miami Dade County, Case No: 86-9201, with a single count of strong arm robbery that occurred on April 2, 1986, in violation of 812.13, Florida Statutes (1986). (A: 5)

On August 11, 1986, the petitioner entered a nolo plea to the robbery. (A: 2, 7) The transcript of the plea colloquy is not available, but the clerk's notes on the docket sheet are: "Deft sworn; waive all applicable costs." (A: 2) The recommended guidelines sentence was 12-17 years. (A: 11-12) On that same date, August 11,

1986, the judge adjudicated petitioner guilty of robbery, a second degree felony, and sentenced him to 12 years in prison with credit for time served. (A: 2, 7-10) The clerk's docket sheet shows the judge recommended "Lantana, must undergo drug treatment," and the written sentence states "the Court further recommends that defendant be incarcerated at Lantana Correctional facility where he can receive drug treatment." (A: 2, 10)

Petitioner filed a petition for writ of error coram nobis in the circuit court on February 24, 1998, on April 28, 1998, and on May 11, 1998; the same petition was filed each time. (A: 13-19) Petitioner, who was in federal prison and no longer in state custody, argued that his guilty plea was uninformed or involuntary and alleged he was never advised of his right to "persist in his plea of not guilty," that neither the court nor his attorney fully explained his Constitutional rights, he did not have a full understanding of the nature of the charge and the consequences of entering a plea of guilty, he was never afforded the needed drug treatment contrary to his understanding of the consequences of his plea, and that the guilty plea was not in literal compliance with Rule 3.172, Fla.R.Crim.P.:

> 6. On August 11, 1986, BIRDSONG entered a plea of guilty to Robbery and sentence was imposed in the amount of 12 years. At the plea colloquy, BIRDSONG was never advised of his right to persist in his plea of not

> guilty, nor did the Court (or his attorney of record) fully explain his Constitutional rights. Moreover, the plea of guilty was not the product of a literal compliance with Florida Rule of Criminal Procedure 3.172. Additionally, BIRDSONG did not have a full understanding of the nature of the charge and the consequences of entering a plea of guilty.
>
> 7. The Court entered judgment. Therein, BIRDSONG was remanded to the custody of the Department of Corrections. Contrary to BIRDSONG's understanding of the consequences of his plea, BIRDSONG was never afforded the needed drug treatment. (A:15-16)

Specifically, in his first argument in the coram nobis, the petitioner claimed he did not understand the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, did not understand the right to trial by jury and did not understand the right to confront his accusers. (A: 16) Since there is no record of the proceedings and they "cannot be revisited upon memory," Boykin v. Alabama, 395 U.S. 238 (1969), states that a waiver of these three important federal rights cannot be presumed from a silent record. (A: 16-17) He further claimed Rule 3.172(e) provides that "proceedings at which a defendant pleads guilty or nolo contendere shall be of record," yet "for reasons unknown to BIRDSONG," no record exists, and further claimed that under 3.721, "the entire sentencing proceeding is made and preserved in such a manner that it can be transcribed as needed," but in his case, no record exists

of the sentencing. (A: 16-17) Petitioner argued the burden "must now shift to the State to show how BIRDSONG's plea was voluntary in a Constitutional sense," and that "without a record of proceedings, the State will not meet its burden. Consequently, BIRDSONG is entitled to be released from the judgment and conviction, as a matter of law." (A: 17)

In his second argument in the coram nobis, the petitioner claimed he did not understand the consequences of his plea, that he was advised he would be going to a drug treatment center located at the Lantana Correctional Facility and that this was the sole reason why he actually entered a plea of guilty, the drug treatment program was a consideration for the plea, and that contrary to the terms of the plea, he was never given the drug treatment:

> 13. BIRDSONG was advised that he would be going to a drug treatment center located at the Lantana Correctional Facility. This is the reason that BIRDSONG actually entered a plea of guilty. The drug treatment program was a consideration of the plea, which operated as a factor that BIRDSONG considered in entering his guilty plea. Moreover, this was the sole reason that BIRDSONG pleaded guilty. Contrary to the terms of the plea as understood by BIRDSONG, the drug treatment program at the Lantana Correctional Facility was not given. (A: 17-18)

For his relief, petitioner requested that he be released from the judgment and

conviction. (A: 18)

On May 8, 1998, Judge Levenson signed an order in the petitioner's case denying a motion for post conviction relief without an evidentiary hearing on the grounds it was not timely filed and it was legally insufficient because "the defendant's proposition of law is unfounded or the law upon which he relies is faulty, or has changed." (A: 20-21)

On June 12, 1998, at a hearing held "in chambers" by Judge Leesfield, the petitioner's coram nobis was denied because it did not "claim errors of fact as required by law." (A: 3) Judge Leesfield's written order denying the coram nobis was filed on June 19, 1998, and stated "Your writs of error coram nobis do not claim error of fact as required by law. (defendant's Petitions 4/28/98 and 5/11/98 denied)." (A: 22)

The petitioner filed his first notice of appeal on May 21, 1998, appealing the order rendered May 8, 1998, denying his "motion for post-conviction relief pursuant to a writ of error coram nobis." (A: 23-24) The defendant appealed Judge :Leesfield's order of June 19, 1998, on July 14, 1998, to the Third District Court of Appeal. (A: 25) The petitioner also filed a petition for writ of mandamus. (A: 26-27) The Third District consolidated all these cases (3d DCA #98-3325 and 3d DCA

#98-1935) as 3d DCA Case No: 98-3325 on January 8, 1999. (A: 26)

On May 19, 1999, the Third District issued its decision in the case, denying the motion for post conviction relief and the petition for writ of coram nobis and mandamus. Birdsong v. State, 732 So.2d 1208 (Fla. 3d DCA 1999). (A: 27) The decision states as follows:

> We affirm the denial of defendant's motion for postconviction relief and deny both his Petition for Writ of Error Coram Nobis and his Petition for Writ of Mandamus. See Fla.R.Crim.P. 3.850(b) (imposing two-year limitation on seeking postconviction relief in noncapital case unless facts on which claim is predicated were unknown to movant or movant's attorney and could not have been ascertained by the exercise of due diligence); see also Calloway v. State, 699 So.2d 849 (Fla. 3d DCA 1997) (holding that habeas petition cannot be used to circumvent the limitations period imposed by rule 3.850); Smith v. State, 506 So.2d 69 (Fla. 1st DCA 1987) (holding that laches may bar claim for postconviction relief).
>
> Denial of Motion for Postconviction relief, affirmed; Petitions for Writ of Error Coram Nobis and Mandamus, denied. (A: 27)

The petitioner filed a notice to invoke this Court's jurisdiction and on April 19, 2000, this Court accepted jurisdiction and appointed the public defender to represent him and file an initial brief on the merits. (A: 28)

SUMMARY OF ARGUMENT

The petitioner submits the decision of the Third District Court of Appeal holding that his petition for writ of coram nobis was time-barred should be quashed and the case remanded where petitioner's writ was filed long before the two-year time limitation set forth in Wood v. State, 750 So.2d 592 (Fla. 1999), and thus was not subject to the two-year time limitation, where petitioner has not used a habeas to circumvent the two-year time limitation, and where laches did not apply to petitioner's case because there was no evidentiary hearing held to resolve factual issues.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL HOLDING THE PETITIONER'S WRIT OF CORAM NOBIS WAS TIME-BARRED SHOULD BE QUASHED AND THE CASE REMANDED WHERE PETITIONER'S WRIT WAS NOT SUBJECT TO THE TWO-YEAR TIME LIMITATION, WHERE PETITIONER HAS NOT USED A HABEAS TO CIRCUMVENT THE TIME LIMITATION AND WHERE LACHES DID NOT APPLY TO PETITIONER'S CASE.

In its opinion, the Third District Court of Appeal affirmed the denial of the petitioner's motion for postconviction relief and denied both his petition for writ of error coram nobis and his petition for writ of mandamus. (A: 27) The petitioner submits the Third District erred and its decision must be quashed.

The Third District ruled against petitioner on three grounds. First, the district court stated that Rule 3.850(b), Florida Rules of Criminal Procedure, imposed a two-year time limitation for defendants seeking postconviction relief in noncapital cases unless the facts on which the claim was predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence. (A: 27) Petitioner submits his coram nobis is not subject to this time limitation.

In Wood v. State, 750 So.2d 592 (Fla. 1999), this Court held that a writ of

coram nobis was the traditional proper pleading for a noncustodial defendant, such as petitioner here, to file to have an earlier plea set aside, but said that such claims should henceforth be filed pursuant to Rule 3.850. See also Nickels v. State, 86 Fla. 208, 98 So. 502 (Fla. 1923) (this Court held that a plea of guilty entered through fear or coercion is an error of fact which may be challenged by coram nobis); State v. Gregersen, ___ So.2d ___, 25 FLW S328 (Fla., April 27, 2000), affirming, Gregersen v. State, 714 So.2d 1195 (Fla. 4th DCA 1998) (claim of involuntary plea is an error of fact, not an error of law, and is properly raised on writ of coram nobis). In Wood, this Court further held that the time limits of 3.850 would henceforth apply to both Rule 3.850 claims and petitions for writ of coram nobis. This Court then held that the Wood decision only applied to defendants who were adjudicated guilty after the date of the Wood decision, which was May 27, 1999, and that all defendants adjudicated prior to the Wood decision would have two years from the filing date of Wood within which to file claims traditionally cognizable under coram nobis. Id., at 595. Recently, in Peart v. State, ___ So.2d ___, 25 FLW S271 (Fla., April 13, 2000), this Court also stated that "pre-Wood petitions were not subject to a like limitation" of the two-year time limitation set forth in Rule 3.850.

Here, the petitioner filed his petition for writ of coram nobis on February 24,

1998, then, having not received a ruling, he filed a second identical petition on April 28, 1998, and a third identical petition on May 11, 1998. (A: 13, 20, 22) Thus, petitioner filed his petition long before the effective date of May 27, 1999, and the 3.850 time limitations of Wood and Peart do not apply. The Third District was incorrect in ruling the two-year time limitation applied and the decision must be quashed and the case reversed.

Second, the Third District stated that a habeas petition cannot be used to circumvent the limitations period imposed by Rule 3.850. (A: 27) Petitioner has not used a habeas petition to circumvent the Rule 3.850 limitations period. This Court in Peart, specifically said that "pre-Wood petitions were not subject to a like limitation," and the petitioner here clearly filed his petition before the two-year Wood limitation applied. His coram nobis is not subject to the two-year time limitation. Kalici v. State, ___ So.2d ___, 24 FLW D1714 (Fla. 4th DCA 1999) (defendant who pled guilty in 1989 and filed petition for writ of coram nobis on March 4, 1998, had two years from filing date of Wood to file a claim traditionally cognizable under coram nobis that plea should be withdrawn because trial court failed to inform him of possible deportation; trial court's order denying petition for writ of coram nobis reversed and case remanded for evidentiary hearing on defendant's coram nobis

petition), review granted, State v. Kalici, 751 So.2d 1254 (Fla. 2000).

Third, the Third District stated that laches may bar the claim for postconviction relief. (A: 27) Laches does not apply here, however, because whether laches applies involves factual issues not properly resolved without an evidentiary hearing, which was never held in this case. See Perry v. State, ___ So.2d ___, 25 FLW D541 (Fla. 1st DCA, Feb. 28, 2000).

And finally, petitioner's claim on the merits is that he did not understand the consequences of his plea, that he was advised he would be going to a drug treatment center located at the Lantana Correctional Facility and that this was the sole reason why he actually entered a plea of guilty, the drug treatment program was a consideration for the plea, and that contrary to the terms of the plea, he was never given the drug treatment. (A: 15-18) The petitioner's claim is supported by the clerk's docket sheet which shows the judge recommended "Lantana, must undergo drug treatment," and the written sentence that states "the Court further recommends that defendant be incarcerated at Lantana Correctional facility where he can receive drug treatment." (A: 2, 10)

The petitioner further claimed his guilty plea was uninformed or involuntary and alleged he was never advised of his right to "persist in his plea of not guilty," that

neither the court nor his attorney fully explained his Constitutional rights and he did not have a full understanding of the consequences of entering a plea of guilty and was never afforded the needed drug treatment contrary to his understanding of the consequences of his plea. (A: 15-18) He alleged he did not understand the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, did not understand the right to trial by jury and did not understand the right to confront his accusers. (A: 15-18) Petitioner points out that since there is no record of the proceedings and they "cannot be revisited upon memory," Boykin v. Alabama, 395 U.S. 238 (1969), holds that a waiver of these three important federal rights cannot be presumed from a silent record. (A: 16) The allegations are properly made in a writ of coram nobis, See Nickels v. State, 86 Fla. 208, 98 So. 502 (Fla. 1923) (this Court held that a plea of guilty entered through fear or coercion is an error of fact which may be challenged by coram nobis); State v. Gregersen, ___ So.2d ___, 25 FLW S328 (Fla., April 27, 2000), affirming, Gregersen v. State, 714 So.2d 1195 (Fla. 4th DCA 1998) (claim of involuntary plea is an error of fact, not an error of law, and is properly raised on writ of coram nobis), and the case should be sent back to the trial court for a hearing.

CONCLUSION

Based upon the foregoing, the petitioner requests that this Court quash the decision of the Third District Court of Appeal and remand the case to the lower court.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14 Street
Miami, Florida 33125
(305) 545-1961

By: Marti Rothenberg
MARTI ROTHENBERG #320285
Assistant Public Defender

CERTIFICATE OF FONT

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

By: Marti Rothenberg
MARTI ROTHENBERG #320285
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this 15th day of May, 2000.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

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_____/

APPENDIX