IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. **Case no. 96,173**
4th DCA case no. 98-729
ANDRE LUDERS, **Broward case no. 96-16922CF10A**

Respondent..
_____/

ON PETITION FOR CERTIORARI REVIEW

FROM THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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For the Respondent

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellee hereby certifies that the following persons and entities have or may have an interest in the outcome of this case.
Honorable Geoffrey D. Cohen - presiding judge

Jeanine M. Germanowicz - Assistant Attorney General

Andre Luders - Appellee/Defendant

John Marinelli - Defendant’s trial counsel

Scott Raft - Assistant State Attorney

H. Dohn Williams Jr. – post conviction relief and appellate attorney for Defendant

CERTIFICATE OF FONT STYLE AND SIZE

The Answer Brief is typed in Times New Roman 14 point type.

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PRELIMINARY STATEMENT

The Defendant below is the Appellee, Andre Luders, and the Plaintiff below, the State of Florida, is the Appellant. References to the record will be by “R" followed by the page number, and references to the evidentiary hearing on the Rule 3.850 will be by “TR" followed by the page number.

STATEMENT OF THE CASE AND FACTS

In September 1996, the Defendant, Andre Luders (hereinafter referred to as "Andre"), was charged by Information with aggravated assault with a knife and misdemeanor battery. (R. 3-4) He retained private counsel, not the undersigned. On or about May 27, 1998, he pled no contest to both offenses; adjudication of guilt was withheld, as to both charges; and he was placed on a 2-year term of probation for the offense of aggravated assault, and he was placed on 1-year term of probation for the offense of battery with it to run concurrent with the 2-year term of probation. (R. 17-21)

Andre is not a United States citizen; he is a citizen of Haiti. After his conviction and sentence, the Immigration and Naturalization Services instituted proceedings against him regarding deportation, because of his plea of no contest to the aforestated charges.

On or about December 30, 1997, while still on probation, Andre filed a Rule 3.850 motion for post conviction relief, including a memorandum of law. (R. 25-43, 44-45) The motion and memorandum were supplemented with an affidavit from Andre that stated:

I, Andre Luders, after being sworn do say: **That because of entering a plea in this case, deportation proceedings have been brought against me, and I will be deported on or about March 4, 1998, unless an order setting aside my plea is entered by February 27, 1998.** (R. 46-47) (emphasis added)

On February 4, 1998, the trial court held an evidentiary hearing regarding his Rule 3.850 motion. At the hearing, Andre's counsel proposed the following stipulation: (1) that deportation proceedings are and have been instituted because Andre entered the plea in this case, and (2) that Andre's prior counsel discussed deportation with him before entering his plea. (TR. 14)

Andre's counsel and the prosecutor had an off-the-record discussion. (TR. 15) Thereafter, the prosecutor presented the agreement and stipulation of the parties:
…Based on the sworn affidavit and the motion as filed by the defendant, I'm willing to concede that it -- **it certainly appears and this Court may take as fact that deportation proceedings have begun; that they are the result of the plea that was entered in this cause**; and that may be considered as -- in this Court's decision as to whether or not grant the 3.850.

In exchange for my agreement in that respect, it's my understanding that the defendant stipulates that were I to call the former counsel in this case…testimony would be able to be elicited to the fact that he did, in fact, discuss with his client the possibility of deportation, and that as a result of those conversations it was indicated by the Defendant that, despite the fact that he might face deportation, he chose to enter the plea anyway…

Judge, based on that stipulation, I would have to, as an officer of the Court, indicate to you that, based on the evidence before you, although I disagree with the conclusions, I think you are compelled to grant the 3.850 as it stands, and then it will be my office's decision as to how we wish to proceed regarding any appellate rights. (TR. 15-16, statements of Assistant State Attorney Scott Raft) (emphasis added)

Based on the facts and the applicable case law, the prosecutor correctly advised the trial court to grant the motion. The trial court set aside Andre's plea, and scheduled a trial date. (R. 50-51) The State filed a timely notice of appeal that stayed the trial. (R. 52-53)
The Fourth District Court of Appeal affirmed the trial court's ruling setting aside Andre's plea. At the State's request, this Court is reviewing Andre's case in conjunction with the Third District Court's decision in Peart v. State, 705 So.2d 1059 (Fla. 3rd DCA), review granted no. 92,629 (Fla. September 14, 1998).

SUMMARY OF ARGUMENT

This case is controlled by the mandatory language of Rule 3.172(c) -- the trial judge must inform the defendant that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service. The Court should adopt the reasoning of Marriott v. State, 605 So.2d 985 (Fla. 4th DCA1992) and Perriello v. State, 684 So.2d 258 (Fla. 4th DCA 1996), that the language of Rule 3.172(c) is mandatory -- the trial judge must inform the defendant that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Naturalization and

Immigration Service. And, if a defendant demonstrates that he was prejudiced by the failure to give this admonition, then he may have his plea set aside.

LEGAL ARGUMENT

Point 1

The trial court correctly granted the Rule 3.850 motion and set aside the plea, because the Defendant demonstrated that he was prejudiced by the trial court's failure to warn him of the deportation consequences of his plea.

The trial court followed the law and correctly set aside Andre's plea. Effective in 1989, the Rules of Criminal Procedure were amended. Rule 3.172(c)(viii) was added, which provides:

That if he or she pleads guilty or nolo contendre **the trial judge must inform** him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Naturalization and Immigration Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases. (emphasis added)

The plea colloquy reflects, and the trial prosecutor stipulated, that the Court did not inform Andre that pleading guilty or nolo contendre would subject him to deportation subject to the laws and regulations of the Immigration and Naturalization Service. **The trial prosecutor stipulated that Andre demonstrated prejudice by the fact that he was scheduled to be deported within days, unless his plea was set aside.** (R. 29-43) (emphasis added)

The courts have long held that the failure to give the admonition is not harmless error. In 1997, the court re-affirmed that compliance with the aforestated rule is mandatory, and that it did not matter that the defendant responded falsely to the court's limited inquiry regarding his citizenship. Sanders v. State, 685 So.2d 1385 (Fla. 4th DCA 1997).

In Perriello v. State, 684 So.2d 258 (Fla. 4th DCA 1996), the court wrote:

The language of Rule 3.172(c) is mandatory. The rule does not permit a written plea agreement to substitute for an on-the-record plea colloquy. Neither the signing of the waiver form, nor the reading of the written plea agreement to the defendant by his trial counsel, can alone satisfy the rule's requirement that the trial judge actually ascertain in open court that the defendant understands the possible consequences of a conviction on his resident alien status. It follows that the defendant be permitted to withdraw his plea and proceed to trial. (emphasis added)

In Marriott v. State, 605 So.2d 985, 987 (Fla. 4th DCA 1992), in setting aside the defendant's plea, this Court held:

We do, however, find merit in appellant's second point on appeal,

that the trial court's failure to advise him regarding immigration consequences sufficiently prejudiced him so that he should be permitted to withdraw his plea. We conclude that rule 3.172(c)(viii) renders it mandatory for the trial judge to instruct all defendants in all cases regarding possible immigration consequences. See also In re Amendments to Florida Rules of Criminal Procedure, 536 So.2d 992 (Fla. 1988). Accordingly, we also recede from Marriott I to the extent that our opinion renders conditional the trial court's duty to inform defendants of the potential for deportation. (emphasis added)

If signing a waiver form or the reading of the written plea agreement to the defendant by his trial counsel did not satisfy the rule, then Andre's counsel having an off-the-record conversation did not satisfy the rule. The trial court had to admonish him. It did not, so it had to set aside the plea. Contrary to Marriot and Perriello, the State wants the deportation admonishment to be "conditional," not mandatory or absolute.[1] The State wants the trial court's duty to inform defendants of the potential for deportation to be "conditional" – if before entering his plea an alien defendant learns from another source that doing so may affect his immigration status, the trial court's failure to admonish him is harmless error.

The State's proposed "I-heard-it-through-the-grapevine" standard is unworkable. What constitutes "actual knowledge" of the consequences of deportation? Is the prosecutor informing him sufficient? Consider the following absurdity that satisfies the State's "I-heard-it-through-the-grapevine" standard. A defendant is incarcerated before trial. He strikes up a conversation with his cellmate who tells him that pleading to the charge(s) may subject him to deportation. Or, while being held prior to trial, his cellmate tells him that his prior cellmate was taken by INS for deportation after pleading to similar charges. Later, the former cellmate "cuts-a-deal" with the State and testifies that the defendant had "actual knowledge of possible immigration consequences," because of their jailhouse discussion. The State's "actual knowledge of possible deportation" standard would render a petition moot if the police, after arresting an alien via a Miranda type warning, tell him he may be deported. Is it sufficient that the accused "heard-it-through-the-grapevine" from fellow convicts, the police, etc?

Having the trial court give the admonition avoids problems. The common man, including the average defendant, considers the judge to be the Delphic Oracle. If the judge says it, it must be true. This Court has mandated that the trial judge be the Delphic Oracle by vesting him with the responsibility of informing a defendant that pleading guilty or no contest to a crime may affect his immigration status.

Even if this Court is inclined to adopt the Peart standard (i.e. he knew deportation was a possibility), the record in this case is insufficient to affirm Andre's plea and conviction. The stipulation provides that Andre's prior counsel "...did, in fact, discuss with his client the possibility of deportation, and that as a result of those conversations it was indicated by the

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[1] The State wants this Court to adopt the reasoning in Peart v. State, 705 So.2d 1059 (Fla. 3rd DCA 1998) – if a defendant was not advised by the court of the immigration consequences, but he has "actual knowledge" of the deportation consequences from some other source, then the omission is harmless.

Defendant that, despite the fact that he might face deportation, he chose to enter the plea anyway." The stipulation did not include what Andre's lawyer said about possible deportation. See, Dugart v. State, 578 So.2d 789 (Fla. 4th DCA 1991) (the trial court failed to comply with the rule and the defendant's public defender erroneously advised him that a second conviction was need for deportation; held, defendant stated adequate grounds for both trial court error and ineffective assistance of counsel, such that either ground sufficient to set aside his plea). Thus, if this Court were inclined to adopt the Peart standard, this case should be remanded to the trial court for further testimony to ascertain -- what counsel advised regarding deportation.

Also, the Peart standard, requires the defendant to show that if he had gone to trial that most probably he would have been acquitted. Because Peart was not the law in the Fourth District, Andre did not address this issue. If this Court adopts the Peart standard, Andre's case needs to be remanded for hearing on this issue.

Andre has already discussed why the "heard-it-through-the-grapevine" test is unworkable. The other prong of the Peart standard that requires that the defendant show he most probably would have been acquitted should also be rejected. In Wuoronos v. State, 676 So.2d 966, 969 (Fla. 1995), rehearing denied, certiorari denied 117 S.Ct. 395, 136 L.Ed.2d 310, this Court encouraged trial judges to use Rule 3.172 as a checklist during the plea colloquy, but said that the failure to follow any of the procedures of this rule shall not render a plea void absent a showing of prejudice. This Court did not add the condition precedent "that had defendant declined the plea and gone to trial, defendant most probably would have been acquitted." This criterion has never been a condition precedent to withdrawing an involuntary plea.

Defendants often go to trial even when the probability that they will be convicted of some offense is high. They do so in the hope of jury pardon, or more realistically in the hope of being found guilty of a lesser offense, such as a misdemeanor. INS views a misdemeanor convicted much differently than a serious violent felony.

Requiring the trial court to read the language of Rule 3.172 does not place an undue burden on the judge. It like, Miranda warnings, provides a workable method for determining whether a defendant's decision was knowingly, intelligently and voluntarily made. Just as Miranda warnings simplified the task of determining the voluntariness of confessions, so does a complete recitation of Rule 3.172 simplify the task of determining that a defendant's decision to plead guilty or no contest is knowingly, intelligently and voluntarily made. The Rule was enacted 9 years ago and it is routinely being followed. There is no need for an exception to be created to allow the omission to be corrected by other means, which, as demonstrated above, may cause more problems than it cures.

CONCLUSION

The trial court and the Fourth District Court's rulings should be affirmed, and Andre should be permitted to proceed to trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed and/or hand-delivered and/or faxed on April 27, 2000, to:

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