IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v.

ANDRE LUDERS,

Respondent.

Case No. 96,173
Fourth District Case No. 98-0729
Seventeenth Circuit Case No. 96-16922 CF10A

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ON PETITION FOR CERTIORARI REVIEW

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INITIAL BRIEF OF PETITIONER

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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 Geoffrey D. Cohen
   Circuit Court Judge, Seventeenth Judicial Circuit
   (trial judge)

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. Andre Luders
   (Respondent/Appellee/Defendant)

5. H. Dohn Williams, Esq.
   (post-conviction trial/appellate counsel for Andre Luders)

6. John Marinelli, Esq.
   (trial counsel for Andre Luders)

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 Hearing on Petitioner’s motion to withdraw plea

STATEMENT OF THE CASE AND FACTS

On September 9, 1996, the State charged Respondent by Information with Count I: aggravated assault and Count II: misdemeanor battery. (R 3-4). The offenses were alleged to have occurred on May 13, 1996. (R 3). On May 27, 1997, before the Honorable Geoffrey Cohen, Respondent entered a negotiated plea of no contest to these charges. (R 17, 18, 35, 39). Respondent could have received up to 15.25 prison months. (R 24, 34). However, in return for his plea, Respondent received a withhold of adjudication on both counts. Further, with regard to Count I, Respondent was required to serve ten days in the Broward County Jail with credit for one day's time served, was required to complete the Family Service Agency program, was placed on probation for two years, and was required to pay fifty dollars in victim costs. (R 17, 18, 20-21, 39-42). With regard to Count II, Respondent was placed on one year probation, concurrent to Count I, with the same terms and conditions as Count I. (R 18, 20-21, 39-42).

Respondent subsequently filed a Florida Rule of Criminal Procedure 3.850 motion for post conviction relief. (R 25). He alleged, among other things, that his plea was involuntary because the trial court did not advise him that his plea could subject him to deportation. (R 26). Respondent attested that deportation proceedings had, in fact, been initiated against him as a result of his plea and that he would be deported unless his plea was set

aside. (R 26, 46). Respondent accordingly requested the trial court to set aside his plea. (R 28). Respondent attached a transcript of the plea colloquy which showed that the trial court did not orally warn Appellant of the possible consequences of deportation. (R 29-42).

On February 4, 1998, a hearing was held on Respondent's motion. (T 1-18). At the hearing, Judge Cohen stated that the plea colloquy showed that the judge had not inquired as to Respondent's understanding of the consequences of the plea on Respondent's immigration status. (T 6). The prosecutor did not dispute this but argued that Respondent had failed to demonstrate any actual prejudice resulting from the trial court's failure to warn Respondent of the possible deportation consequences. (T 12).

Subsequently, the prosecutor and Respondent's counsel stipulated that deportation proceedings had begun as a result of the plea in this case. (T 15). They also stipulated that Respondent's counsel did discuss the possibility of deportation with Respondent but that Respondent chose to enter his plea despite the fact that he might be deported. (T 16). On February 5, 1998, the trial court issued a written order granting Respondent's motion and setting aside Respondent's conviction, judgement and sentence. (R 50-51). The State filed a timely notice of appeal on February 18, 1998. (R 52).

On appeal, the District Court of Appeal, Fourth District,

affirmed the trial court's order in *State v. Luders*, 731 So. 2d 163 (Fla. 4th DCA 1999), on the authority of *Perriello v. State*, 684 So. 2d 258 (Fla. 4th DCA 1996), and *Marriott v. State*, 605 So. 2d 985 (Fla. 4th DCA 1992). The Fourth District subsequently granted the State's motion to certify conflict and certified conflict with *Peart v. State*, 705 So. 2d 1059 (Fla. 3rd DCA 1998), *rev. granted*, No.92,629 (Fla. Sept. 14, 1998). (See Appendix).

SUMMARY OF THE ARGUMENT

There was no clear showing of prejudice in the instant case. First, Respondent stipulated that trial counsel had warned him of the immigration consequences of his plea and that Respondent chose to enter the plea despite this warning. Clearly, Respondent had actual knowledge of the plea's consequences. Second, Respondent failed to adduce any proof that he would have likely been acquitted had he proceeded to trial. The trial court erred in granting relief in the absence of a showing of actual prejudice. The Fourth District erred in affirming the trial court's errors.

ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING RESPONDENT TO WITHDRAW HIS PLEA AND THE FOURTH DISTRICT ERRED IN AFFIRMING THE TRIAL COURT.

Respondent complained below, in a Florida Rule of Criminal Procedure 3.850 motion, that he should be allowed to withdraw his plea because, contrary to the requirements of Florida Rule of Criminal Procedure 3.172(c)(8), the trial judge failed to warn him of the deportation consequences of his plea. The trial court granted Respondent's motion and vacated Respondent's plea. The trial court erred in granting Respondent's motion to withdraw his plea because Respondent failed to show the prejudice or manifest injustice necessary to withdraw his plea and gain relief under Rule 3.172(i). 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 he or she may be subject to deportation, will not render a plea void absent a showing that the defendant was prejudiced **in fact** because the required information was not made available to him. 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); *Freber v. State*, 638 So. 2d 140 (Fla. 4th DCA 1994).

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).

The Fourth District, in *Marriott v. State*, 605 So. 2d 985 (Fla. 4th DCA 1992), dealt with a defendant seeking to withdraw his plea because he had not been informed of the deportation consequences of such a plea. The Fourth District ultimately held that such a defendant was required to demonstrate **actual** prejudice.

In *Marriott,* the Fourth District noted the fact that the defendant had no **actual** knowledge of the consequences because neither the judge nor defendant's trial counsel warned the defendant of the possible deportation consequences of his plea. Further, the court, in making its ruling, relied upon the fact that the defendant would not have entered the plea had he known of the possible consequences attached to that plea as well as the fact that the defendant was actually at risk of deportation.

The Fourth District, in *Perriello v. State*, 684 So. 2d 258 (Fla. 4th DCA 1996), later 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). Conversely, in *Peart v. State*, 705 So. 2d 1059, 1063 (Fla. 3d DCA), *conflict jurisdiction accepted*, 722 So. 2d 193 (Fla. 1998), the Third District Court of Appeal indicated that a proper showing of prejudice would necessitate not only an assertion that the defendant had no actual knowledge of the deportation consequences of his plea and an assertion that he would not have entered into the plea but, in addition, an assertion that, had the defendant gone to trial, he

most probably would have been acquitted.[1]

The Third District certified conflict with *Marriott* on this ground. As can be seen, the holding in *Marriott* differs in degree rather than in kind from the holding in *Peart*. Both require a strong showing of **actual** prejudice. The crucial distinction is in what constitutes actual prejudice. The State submits that this Court should follow the Third District's broader analysis and adopt, **at a minimum**, the first four prongs of the *Peart* test. The Court should eschew the Fourth District's analysis in *Marriott* and

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[1] In *Peart*, the Third District established a procedure for establishing the prejudice necessary to set aside a plea due to a failure to comply with Rule 3.172(c)(8). The Third District succinctly and clearly explained the procedure as follows:

> the motion must assert and the defendant must prove the following:
>
> a) the defendant was not advised by the court of the immigration consequences;
>
> b) that defendant had no actual knowledge of same;
>
> c) that INS had instituted deportation proceedings, or defendant is at risk of deportation;
>
> d) that defendant would not have pled had defendant known of the deportation consequences; and
>
> e) that had defendant declined the plea and gone to trial, defendant most probably would have been acquitted.

Peart, 705 So. 2d at 1064. (footnote omitted).

Perriello on this issue because the Fourth District's definition of actual prejudice is much too narrow.

This would necessitate a reversal of the Fourth District's decision based on the facts of the instant case because in the instant case Respondent stipulated that he knew of the consequences but entered the plea anyway. (T 16). Respondent obviously thought, given the punishment he negotiated under the plea bargain, that pleading no contest was to his advantage at the time. Thus Respondent suffered no actual prejudice.

Perhaps Respondent took a chance because he was hoping that the Immigration and Naturalization Service (INS) would overlook his case or decide it was not worth pursuing. Unfortunately for Respondent, the INS decided to initiate deportation proceedings based on Respondent's plea. Thus, Respondent found it expedient, after the fact, to take advantage of the judge's omission. This was a "gotcha" maneuver that should not have been allowed to succeed. *State v. Belien*, 379 So. 2d 446, 447 (Fla. 3d DCA 1980); *State v. D.C.W.*, 426 So. 2d 970, 971 (Fla. 4th DCA 1982), *affirmed*, 445 So. 2d 333 (1984).

As Judge Shack understood in his specially concurring opinion in this case, this Court perpetuates this kind of unfairness if it allows the ruling below to stand. *State v. Luders*, 731 So. 2d 163 (Fla. 4th DCA 1999). That is, if the ruling stands, then it allows an immigrant defendant to enter a plea knowing of the possible

consequences of deportation and then unfairly take advantage of the court's mistake by simply moving to withdraw the plea if deportation consequences are, in fact, initiated. The defendant has unfairly secured a windfall.

It is notable that Florida Rule of Criminal Procedure 3.172(a) states that defense counsel shall assist the trial judge in ensuring that a plea is voluntarily entered. Thus, it would also be unfair to allow a defendant's counsel to be aware that a plea may have deportation consequences, to advise his client of those possible consequences, to stand idly by while the trial judge fails to reiterate those consequences, and then to complain, when advantageous, that the plea was not entered voluntarily. Unfortunately, if this Court were to adopt the per se rule urged below by Respondent, and endorsed by the Fourth District, it is clear that this unfairness would be the end result.

Because Respondent was well aware of the consequences of his plea, Respondent could not, and did not, demonstrate any clear prejudice or manifest injustice resulting from the trial court's failure to reiterate counsel's warning of the possible immigration consequences. Thus, contrary to the result reached by the Fourth District, the State submits that under Rule 3.172(i) and the first four prongs of the *Peart* test, Respondent should not have been allowed to withdraw his plea.

Additionally, if, as the State urges, this Court also adopts

the fifth prong of Peart, requiring a defendant to allege and prove that, if they had declined the plea and gone to trial, they most probably would have been acquitted, it is clear that Respondent also failed to satisfy this prong. *Peart*, 705 So. 2d at 1064. Here, the State provided, at the plea hearing, a factual basis for the plea. (R 38-39). Respondent made no objections to this factual basis. Subsequently, Respondent sought to withdraw his plea but did not allege or prove that if he had gone to trial, he most likely would have been acquitted.

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.

In conclusion, the trial court should have denied Respondent's motion based on Rule 3.172(i). Failing that, the appellate court should have reversed the grant of Petitioner's motion based on Rule 3.172(i) and adopted the test set forth in *Peart*. The State respectfully requests that this Court set matters aright by reinstating Respondent's plea and sentence.

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 Respondent's motion to withdraw plea and reinstate Respondent's plea of no contest, 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 H. Dohn Williams, Jr., P.A., P.O. Box 1722, Fort Lauderdale, FL, 33302 on April 27, 2000.

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Of Counsel

APPENDIX