IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,587

FILED
DEBBIE CAUSSEAUX
NOV 18 1999
CLERK, SUPREME COURT
BY

STATE OF FLORIDA,

Petitioner,

v.

GINO KALICI,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

NEAL A. DUPREE, ESQ.
Law Offices of Neal A. Dupree
440 South Andrews Avenue
Ft. Lauderdale, FL 33301
(954) 766-8872
Florida Bar No. 311545

Counsel for Respondent

CERTIFICATE OF INTERESTED PERSONS

Respondent, GINO KALICI, states that to his knowledge the following individuals or entities have an interest in the outcome of this **case:**

Honorable Arthur Birken, Circuit Court Judge

Honorable Robert B. Carney, Circuit Court Judge

Neal A. Dupree, Esq., Attorney for Respondent

Gino Kalici, Respondent

Todd Neesum, Immigration Attorney for Respondent

Assistant Attorney General, W.P.B., FL, Attorney fox Petitioner

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PRELIMINARY STATEMENT

The following symbols, abbreviation and references will be used in this instant cause:

The term "Respondent" shall refer to Gino Kalici.

The term "Petitioner" or "State" shall refer to the Petitioner.

"R." shall refer to the record on appeal to the Fourth District Court of Appeal (Attached as Exhibit 2 of Petitioner's Initial Brief on Jurisdiction).

All other citations will be self-explanatory or will be otherwise explained.

STATEMENT OF FONT

The font is 12 point courier, not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent, Gino Kalici, requests this Court to deny jurisdiction to review the decision of the Fourth District Court of Appeal in Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999). The Fourth District found that Respondent, a resident alien, pled guilty to delivery of a controlled substance on November 17, 1986. Id. Respondent was sentenced to two years probation and was required to pay a fine. Id. Respondent successfully completed probation in January, 1988.

In December 1997, the Immigration and Naturalization service arrested Respondent and initiated deportation proceedings against him as a result of the 1986 conviction. Id. Respondent filed a Petition for Writ of Error Coram Nobis on March 4, 1998. In his petition, Respondent requests that his plea be withdrawn because the trial court failed to inform him that a guilty plea could affect his immigration status, and, could possibly result in his deportation. Not only did the trial court fail to inform Respondent of the adverse consequences of his plea, his trial counsel affirmatively misadvised Respondent that he could not be deported since he was not receiving jail time. Respondent's counsel also failed to request a judicial recommendation against deportation. (R. 16, 17).

The trial court denied Respondent's petition on the basis that a Writ of Error Coram Nobis was not viable because it had been untimely filed. (R. 48). The trial court ruled that the two (2)

year limitation set in Fla. Rule Crim. P. 3.850 also applied to Coram Nobis petitions. (R. 36, 47, and 48).

On appeal, the Fourth District, relying on this Court's decision in Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999), reversed the trial court's order and remanded for an evidentiary hearing. Petitioner's motion for rehearing was denied on August 19, 1999. On September 17, 1999, petitioner filed its notice to invoke this Court's jurisdiction.

SUMMARY **OF THE** ARGUMENT

This Court does not have jurisdiction to review the decision of the Fourth District Court of Appeal in Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999) because Wood v. State, 24 Fla. L. Weekly 5240 (Fla. May 27, 1999) was not misapplied. The Fourth District did not ignore the doctrine of laches, in fact, it recognized its past decisions involving the doctrine and determined under the plain language of Wood that Respondent has two years from the filing of Wood to file a claim traditionally cognizable under coram nobis. Kalici at D1714. Furthermore, the Fourth District did not breathe new life into a postconviction claim which has been previously held barred. Respondent presented his claim, pertaining to the failure of the trial court to advise him of the consequences of his plea and the affirmative misadvice of his original counsel regarding the same plea, for the first time in his Motion for Writ of Error Coram Nobis. There was no previous ruling based on procedural time limits or the merits of the motion prior to the instant decision, Respondent in no way used coram nobis as a means of circumventing the procedural requirements of other collateral avenues. Because the Fourth District's decision is consistent with Wood, no conflict with the law as enunciated by this Court exists. Thus, jurisdiction does not lie with this Court.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL APPLIED THIS COURT'S DECISION IN WOOD V. STATE, 24 FLA. L. WEEKLY S240 (FLA. MAY 27, 1999), PROPERLY, THEREFORE THIS COURT DOES NOT HAVE JURISDICTION.

Contrary to the State's assertion, this Court does not have jurisdiction to review the decision of the Fourth District court of Appeal in Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999). Pursuant to Article V, §3(b)(3) of the Florida Constitution this Court may review the decision of a district court of appeal where that decision is in direct conflict with a decision of this Court on the same question of law. In the instant case, the Fourth District properly applied this Court's decision in wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999).

In Wood v. State this Court held that writs of error coram nobis are subject to the two year time limitation delineated in Fla. R. Crim. P. 3.850 and determined that "all defendants adjudicated prior to this opinion shall have two years from the filing date within which to file claims traditionally cognizable under coram nobis." Id. at S241. As the Fourth District indicated, Respondent falls into this category of defendants who were adjudicated prior to the Wood opinion. As such, Respondent would be entitled to file a claim traditionally cognizable under coram nobis.

The State contends that the Fourth District's application of

Wood was incorrect for two reasons. First, the State believes the Fourth District ignored the doctrine of laches, where both the Fourth District and this Court have applied the doctrine to bar coram nobis claims in the past. In support of this position, the State cites Gregersen v. State, 714 So. 2d 1195 (Fla. 4th DCA 1998) and McCray v. State, 699 So. 2d 1366 (Fla. 1997), both of which are clearly decided prior to Wood.

The State overlooks the fact that the Fourth District did take into consideration the doctrine of laches and how it has applied the doctrine in previous cases involving writs of error coram nobis. The Fourth District specifically stated:

> This court has repeatedly held petitions for writs of error coram nobis are time barred by laches if filed more than two years after judgment and sentence have become final. See State v. Elise, 727 So. 2d 1030 (Fla. 4th DCA 1999); Gabriel v. State, 723 So. 2d 1030 (Fla. 4th DCA 1998); State v. Taylor, 722 So. 2d 890 (Fla. 4th DCA 1998).

Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999). However, the Fourth District made clear that the language of Wood clearly affords Respondent the opportunity to present a coram nobis claim regardless of the previous application of laches.

The premise that the Fourth District's decision is consistent with Wood is further evidenced by the similarities between Respondent's circumstances and the facts of the Wood case. n wood, the petitioner was seeking to set aside a plea more than ten years after such plea was entered. Likewise, Respondent's writ of error coram nobis seeks to vacate a plea approximately twelve years old, a similar time frame as that in Wood. Also, both Wood and

Respondent entered pleas based on misrepresentations of the law by their attorneys. Therefore, similar problems regarding records and possible prejudice to the State would exist in both cases due to the time that has elapsed. Yet, this Court concluded, without any discussion regarding laches, that the petitioner in Wood was "not time barred since this Court is only now applying this limitation period to writs of error coram nobis." Wood at S241. Based on these facts and this Court's conclusion, it is evident that the Fourth District properly considered its previous rulings pertaining to the doctrine of laches and properly applied Wood v. State.

Additionally, both McCray v. State, 699 So. 2d 1366 (Fla. 1997) and Gregersen v. State, 714 So. 2d 1195 (Fla. 4th DCA 1998) are distinguishable from Respondent's case. In both of those cases the petitioner was unable to provide any reason for the delay in filing a coram nobis claim. However, Respondent has asserted in a sworn statement that he did not proceed sooner with the writ for error coram nobis because he was not made aware of the basis of the writ until deportation proceedings were begun against him in 1997. From the time his plea was entered in 1986, Respondent was under the false impression that he could not be deported as a result of his plea. This perception was created by not only the failure of the trial court to inform Respondent that his resident alien status may be affected by the plea, but by the affirmative misrepresentation of Respondent's original counsel that he could not be deported because he was not receiving jail time. (R. 16, 17). All of these factors were presented to the Fourth District

for its determination of Respondent's appeal. (See Initial Brief of Appellant Gino Kalici).

The State's second assertion is that the Fourth District erred by allowing new life to be breathed into Respondent's claim. The State explains that this error is in "contravention of the dictates of Wood." (Brief of Petitioner on Jurisdiction, p. 7). In Wood, this Court explained that "coram nobis claims cannot breath life into postconviction claims which have previously been held barred." Wood at S241 (citing Vonia v. State, 680 So. 2d 438, 439 (Fla. 2d DCA 1996)). The State has seemingly misinterpreted this language in arguing that Respondent's claim would not have been viable in any postconviction proceeding because he failed to use due diligence in investigating and filing the claim, because no relief is available under Fla. R. Crim. P. 3.172 since it went into effect after his plea and because he should not be permitted to enjoy the benefits of probation and now be permitted to complain. As is evident from this Court's opinion, this language addresses petitioners who have already had a determination of their claims under an alternative postconviction remedy such as Fla. R. Crim. P. 3.850. This Court, citing Richardson v. State, 546 So. 2d 1037, 1038-39 (Fla. 1989), expresses the intent that writs of error coram nobis can not be used to circumvent Rule 3.850. Wood at S241. Therefore, the Fourth District did not breath life into a claim which has been previously held barred since Respondent has not filed any postconviction pleadings prior to his petition for writ of error coram nobis, nor has any postconviction pleading been

previously ruled upon. Respondent's Motion for Writ of Error Coram Nobis is his first avenue for seeking postconviction relief,

Notwithstanding the State's misinterpretation of Wood, Respondent's petition for writ of error coram nobis establishes a basis for relief. The State is correct that Fla. R. Crim. P. 3.172(c)(8), which requires judges presiding at plea colloquies to inform the defendant of the consequence that his plea may subject him to deportation if he is not a United States citizen, became effective in January 1989. The change in the format for conducting a plea colloquy constitutes a fundamental departure in the law to address the unfairness of allowing deportation proceedings against defendants who are not advised about the immigration consequences of their changes of plea. Although this change occurred after Respondent entered his plea, Due Process and fundamental fairness require that Respondent be allowed to change his plea.

Additionally, not only did the court presiding over Respondent's plea colloquy fail to advise him of the immigration consequences of his plea, Respondent's counsel at the plea colloquy affirmatively misadvised Respondent that he could not be deported. See State v. Sallato, 519 So. 2d 605 (Fla. 1988)(holding that a hearing should have been conducted by the trial court when an attorney affirmatively misadvised his client about the consequences of his change of plea). Respondent's counsel then failed to seek a recommendation by the sentencing judge to prevent Respondent's deportation. See Dugart v. State, 578 So. 2d 789 (Fla. 4th DCA 1991) (holding that a defendant should be allowed to withdraw his

plea when a defendant received ineffective assistance when his attorney failed to request a recommendation against deportation from the sentencing judge).

The State contends that in failing to file a motion to withdraw plea within two years of the effective date of the amendment to Fla. R. Crim. P. 3.172(c)(8), "Respondent did not use due diligence to investigate and challenge the plea." (Brief of Petitioner on Jurisdiction, p. 8). As the State properly cites, according to Wood, Fla. L. Weekly at S241 and Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979), "it must appear that defendant or his counsel could not have known [of the alleged facts1 by the use of diligence." Here, once the facts upon which Respondent bases his motion were known to him, Respondent was timely in filing his Motion for Writ of error Coram Nobis. At the time the change in Rule 3.172 occurred, Respondent had completed his probation and no longer had counsel. Respondent had no way of knowing there was a change in the procedure for plea colloquies, nor would he have any reason to believe that his attorney had misadvised him regarding the possibility of deportation. It was not until deportation proceedings were initiated against him in December of 1997, that he had any knowledge of the consequences of his plea. Respondent then filed his motion on March 4, 1998, well within the two year period from discovery of the facts giving rise to his motion.

Finally, the State makes the argument that "because the Respondent enjoyed the benefits of probation, he should not be permitted to complain." (Initial Brief of Petitioner on

Jurisdiction, p. 8). Each of the cases cited by the State involves defendants who received probation, then upon revocation challenged the conditions of the probation. The Respondent points out that these facts are not similar to the instant circumstances, nor are any of these cases relevant. Respondent is not challenging the conditions of his probation. Respondent successfully completed probation, and here challenges whether he was afforded due process and fundamental fairness when he was not informed, in fact misinformed, of the significant consequences of his plea.

The Fourth District Court of Appeal did not misapply this Court's decision in Wood v. State. In fact, the Fourth District considered its previous decisions in which the doctrine of laches was applied and properly determined that the language in Wood allows Respondent the opportunity to present his claims at an evidentiary hearing. Respondent's Motion for Writ of Error Coram Nobis is not an attempt to circumvent any previous postconviction ruling, since there has been no prior ruling. Thus, the Fourth District has not breathed life into a postconviction claim which has previously been held barred. Because the requirements of Article V, §3(b)(3) are not met, jurisdiction does not lie with this Court.

CONCLUSION

WHEREFORE, Respondent, GINO KALICI, through undersigned counsel, respectfully requests that this Court deny jurisdiction.

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been provided by U.S. Mail to Celia Terenzio,

Assistant Attorney General, Bureau Chief and Leslie T. Campbell, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401-2299 this 17 day of November 1999.

Respectfully submitted,

LAW OFFICES OF NEAL A. DUPREE
440 South Andrews Avenue
Ft. Lauderdale, Florida 33301
(954) 766-8872
Florida Bar No. 311545

By:
NEAL A. DUPREE

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BY________________

Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1925

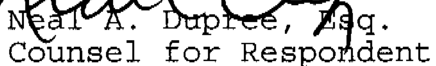
ATTN : Barbara Price
State v. Kalici, Case No. 96,587

Dear Ms. Price,

Please find enclosed an original and seven (7) copies of Respondent's jursdictional brief.

If I can be of any further assistance, please do not hesitate to call me.

Sincerely,



Neal A. Dupree, Esq.
Counsel for Respondent

Law Offices of Neal A. Dupree
440 South Andrews Avenue
Ft. Lauderdale, FL 33301
(954) 766-8872