IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,587

STATE OF FLORIDA,

Appellant,

vs.

GINO KALICI,

Appellee.

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

PETITIONER'S REPLY BRIEF ON THE MERITS

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CASE NO. 96,587

STATE OF FLORIDA v. GINO KALICI

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, Appellant herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

TABLE OF CONTENTS

AUTHORITIES CITED

Cases Cited

Other Authority Cited

PRELIMINARY STATEMENT

Appellant, the State of Florida, was the prosecution in the trial court below and will be referred to herein as “Appellant” or the “State”. Appellee was the defendant in the trial court below, and will be referred to herein as “Appellee” or “Defendant”. Reference to the record on appeal will be by the symbol “R”, reference to the transcripts will be by the symbol “T”, reference to any supplemental record or transcripts will be by the symbols “SR[vol.]” or ST[vol.]” and reference to Respondent’s Answer Brief will be by the symbol “AB” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of the case and facts presented in its Initial Brief on the Merits and as presented in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

POINT I - Because the trial court noted the 12 year delay between Respondent's plea and coram nobis petition disadvantaged the State, the traditional doctrine of laches was applied in denying relief. The district court erred in not recognizing this and in its application of Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999). The Court should find traditional laches applies and remand for reinstatement of the trial court's order.

POINT II - When Respondent entered his plea in November 1986, trial courts were not required to inform defendants of deportation consequences. To permit a hearing on this matter 12 years later is breathing life into a non-existent claim in contravention of Wood.

POINT III - The State relies upon its argument presented in its Initial Brief on the Merits.

POINT IV - The State relies upon its argument presented in its Initial Brief on the Merits.

POINT V - The Court should follow the rationale of Peart v. State, 705 So. 2d 1059 (Fla. 1998), rev. granted, 722 So. 2d 193 (Fla. 1998) and require those seeking to withdraw their plea to prove they would have been acquitted at trial.

POINT VI - Respondent has not established he received ineffective assistance of trial counsel as he presented this claim

in a conclusory manner and failed to show that he would have been acquitted had he elected to go to trial.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN ITS APPLICATION OF WOOD V. STATE, 24. FLA. L. WEEKLY S240 (FLA. MAY 27, 1999) WHEN IT DID NOT ACKNOWLEDGE THAT RESPONDENT'S CORAM NOBIS CLAIM WAS BARRED BY TRADITIONAL LACHES.

In Point B of Respondent's Answer Brief, he claims the trial court did not base its denial of coram nobis relief upon the doctrine of laches nor did the State make this argument[1] to that court. (AB 11-12). Knowing the transcripts from the 1986 hearings had been destroyed the trial judge reasoned:

> I see enormous disadvantages to the State. [The case] may not be prosecutable. The State does not have anything anymore. It is 12 years ago. Where they have destroyed things on this because it was so long gone.

(R 37). Contrary to Respondent's assertion, the judge was applying traditional laches in denying the coram nobis petition. Whether

[1]As is obvious from the March 20 and July 20, 1998 hearing transcripts, the State was not present. In fact, as directed by the trial court, Respondent was ordered to make the State aware of the petition and any case law holding the application of Florida Rule of Criminal Procedure 3.172(c)(8) retroactive. (R 27, 36-37, 39). While the State did not have the opportunity to make the laches argument during the hearing, such argument was considered sua sponte by the trial judge. It is the judge's ruling which is at issue. Because laches formed the basis of the that ruling, the matter is ripe for review and should be found a sufficient, valid reason for denying the petition even absent the State's argument on the point.

the trial court also found the petition untimely because more than two years had passed (R 44), does not detract from the finding traditional laches barred the claim. Bartz v. State, 740 So. 2d 1243 (Fla. 3d DCA 1999)(finding coram nobis petitioner not time-barred under Wood, but laches would bar defendant who had not used due diligence to discover defect and transcripts were destroyed); Perry v. State, 25 Fla. L. Weekly D541, 543 (Fla. 1st DCA, February 28, 2000)(recognizing laches applies in coram nobis petitions, but certifying a question whether Wood authorizes use of coram nobis where alleged error concerns whether the law was applied properly to the facts known or the facts which should have been known through due diligence at the time of the alleged error). See also, Anderson v. Singletary, 688 So. 2d 462 (Fla. 4th DCA 1997)(finding traditional laches cars postconviction relief claim when delay has been unreasonable and has resulted in prejudice to the State due to the unavailability of records); State v. Caudle, 504 So. 2d 419, 423 (Fla. 5th DCA 1987)(reasoning that "[t]o allow a defendant to delay until state records or witnesses are unavailable and then to seek to place an impossible burden of proof on the state is inequitable and unjust").

Respondent asserts he used due diligence to discover the claim because he filed a petition shortly after deportation proceedings

commenced. (AB 13-14). Contrary to Respondent's position, the initiation of deportation is not the point at which the alleged claim arose. According to Respondent, neither the trial court nor defense counsel informed him of possible deportation arising from his November 17, 1986 guilty plea. However, neither the court nor counsel had the duty to discuss deportation consequences with Respondent. See Florida Rule of Criminal Procedure 3.172(c) (1986); Fundora v. State, 513 So. 2d 122 (Fla. 1987)(finding immigration repercussions collateral to plea; such may not form basis for ineffective assistance of counsel claim); Marriott v. State, 605 So. 2d 985, 987 (Fla. 4th DCA 1992)(holding counsel's failure to advise client of possible deportation "does not make an adequate case of ineffective assistance of counsel").

If there was a claim, it arose on January 1, 1989 when Rule 3.172(c) was amended to provide that judges must inform defendants of possible deportation consequences. In re Amendments to Florida Rules of Criminal Procedure, 536 So. 2d 992, 992 (Fla. 1988). Waiting nine years after the rule change is not using due diligence. Furthermore, the fact Respondent is blaming his original counsel[2] for not informing him of likely deportation does

[2]State relies upon its argument presented in Point VI of both its Initial and Reply Briefs to address Respondent's claim related to the alleged misadvice of counsel.

not absolve Respondent of his duty to have brought the claim against the trial court's plea colloquy shortly after the amendment to Rule 3.172(c)(8). Having failed to attack the acceptance of the plea until 12 years had passed establishes the lack of due diligence. Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979)(reasoning defendant or his counsel must use due diligence to determine facts for claim), overruled on other grounds, Jones v. State, 591 So. 2d 911 (Fla. 1982); Wood, 24 Fla. L. Weekly at S241 (reaffirming due diligence requirement announced in Hallman and hastening "to add that the discovery of facts giving rise to a coram nobis claim will continue to be governed by the due diligence standard"). Cf. McCray v. State, 699 So. 2d 1366 (Fla. 1997)(finding a habeas corpus petition "is presumed to be the result of an unreasonable delay and prejudice to the state if the petition has been filed more than five years from the date the petitioner's conviction became final"). Having failed to recognize or apply laches in Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999) the district court misapplied Wood and disregarded Hallman and McCray. The district court opinion should be quashed and the trial court's order reinstated.

POINT II

THE DISTRICT COURT ERRED IN BREATHING LIFE INTO A NON-EXISTENT CLAIM AS A PLEA COLLOQUY

CONDUCTED IN 1986 WAS NOT REQUIRED TO INCLUDE A DISCUSSION OF POSSIBLE DEPORTATION CONSEQUENCES.

In his Point D, Respondent asserts the State misinterpreted Wood, 24 Fla. L. Weekly at S241 and Vonia v. State, 680 So. 2d 438, 439 (Fla. 2d DCA 1996) when maintaining new life was breathed into the claim (AB 19-20). The State submits life was breathed into a non-existent claim and such is not permitted under Wood. If a claim does not exist, then the extension of new time limits for petitions which cover many areas does not create a cause of action where none existed. It is error to require re-litigation where it has been determined there was no defect in the plea colloquy.

Rule 3.172(c)(8) became effective January 1, 1989 and was not applied retroactively. Medina v. State, 711 So.2d 256, 257 (Fla. 3d DCA 1998)(holding defendant who entered plea before January 1, 1989 was not required to be informed of deportation and had no coram nobis claim). Given the fact, no claim exists, it was error to return the matter to the trial court for additional hearings.

Respondent maintains that even if no relief is warranted under Rule 3.172(c)(8), he is entitled to withdraw his plea due to the alleged affirmative misadvice of counsel. The State relies upon its argument set forth in Point VI of its Initial and Reply briefs.

POINT III

RESPONDENT IS NOT ENTITLED TO WITHDRAW HIS PLEA BASED UPON HIS CHALLENGE TO THE PLEA COLLOQUY AS THE SUFFICIENCY OF THE COLLOQUY IS A QUESTION OF LAW NOT TRADITIONALLY COGNIZABLE UNDER THE WRIT OF ERROR CORAM NOBIS.

State relies upon the argument set forth in its Initial Brief to reply to Respondent's Point A.

POINT IV

THE DISTRICT COURT MISAPPLIED WOOD IN NOT RECOGNIZING RESPONDENT'S FAILURE TO USE DUE DILIGENCE TO BRING FORWARD HIS CLAIM.

State relies upon the argument presented in its Initial Brief.

POINT V

THE DISTRICT COURT ERRED IN REQUIRING AN EVIDENTIARY HEARING ON A PETITION THAT WAS LEGALLY INSUFFICIENT UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.172(i) AND PEART V. STATE, 705 SO. 2D 1059 (FLA. 3D DCA), REV. GRANTED, 722 SO. 2D 193 (FLA. 1998).

Under Respondent's Point C, he asserts his petition for writ of error coram nobis was legally sufficient because prejudice was shown when deportation proceedings were instituted (AB 17). This Court should follow Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA), rev. granted, 722 So. 2d 193 (Fla. 1998) and find for the withdrawal of a plea, prejudice is established when it is shown the defendant did not possess the correct information and that had the defendant been advised properly he would not have entered the plea,

and had he gone to trial he would have been acquitted. Peart, 705 So. 2d at 1063. Such a standard protects the judicial process from those who would take an advantageous plea and gamble that the Immigration and Naturalization Service will overlook the crime and not commence deportation. To require the State to try a defendant, often many years after he entered his plea and destruction of records, and when the likely outcome would be a guilty verdict, is a waste of judicial resources and an abuse of the system. See Caudle, 504 So. 2d at 423 (permitting defendant to delay seeking relief until records or witnesses are unavailable is inequitable and unjust to the state).

Such an abuse is keenly felt in this case. Twelve years after pleading guilty, Respondent sought to withdraw his plea. In the original coram nobis petition filed on March 3, 1998, Respondent claimed his counsel did not advise him of deportation (R 2 ¶¶6 and 8). Subsequently, on March 20, 1998, Respondent filed a motion to set aside his plea under Florida Rule of Criminal Procedure 3.850 (R 4-9). After the March 20, 1998 hearing, held in the State's absence, the trial court ordered Respondent to produce case law on the issues of (1) whether Rule 3.172(c)(8) could be applied retroactively and (2) whether the claim could be raised 12 years after the sentence was final (R 34-37). On June 10 and June 12,

1998, the coram nobis petition and Rule 3.850 motions were denied respectively (R 10, 11). Rehearing on the denial of the Rule 3.850 motion was filed and on June 22, 1998, it was denied (R 12-15). Without any independent record evidence that additional information or an affidavit was sought by the trial court, Respondent filed an affidavit on July 21, 1998 claiming his trial counsel affirmatively misadvised him about deportation (R 16-20). Thus, this affidavit was filed after two hearings had been held on the matter, and a month after the motion for rehearing was denied. At no time before filing his Answer Brief with this Court has Respondent claimed he would have been acquitted had he gone to trial. The closest he comes to making this declaration is in footnote 2 in his brief where he asserts a motion to suppress had been denied prior to the entry of his plea (AB 18). However, such is not part of the record and does not prove there was no other evidence showing Respondent's guilt beyond a reasonable doubt. In fact, in entering his plea, Respondent had to have admitted the factual basis for the charge, thereby, establishing his guilt.

Given the fact the system can be manipulated by those gambling against deportation, with the result criminal cases lack finality, the Court must adopt the Peart rationale and require that before a plea is vacated, a defendant must show he would have been acquitted

had he gone to trial. Such procedure could be employed for both misadvice rendered by the trial court or defense counsel.

POINT VI

RESPONDENT SHOULD NOT BE PERMITTED TO WITHDRAW HIS PLEA BASED UPON ALLEGED MISADVICE OF TRIAL COUNSEL.

In Points B and E, Respondent asserts he should be permitted to withdraw his plea based upon the alleged misadvice received from counsel (AB 12-16, 22). Initially Respondent did not inform the judge of this ground beyond claiming counsel had not told him about deportation (R 2 ¶¶ 6 and 8). It was a month after the rehearing on the Rule 3.850 motion was denied that he produced an affidavit blaming his trial counsel. As recognized by the judge:

> The Court is a little confused why this is on the docket. There was originally a motion to set aside the plea, which had been denied. There was a motion for re-hearing, and that was denied. And we seem to be having a re-hearing after I denied the motion for re-hearing.

(R 40-41). Continuing, the trial judge stated:

> What I'm indicating, for all the reasons at this point, I'm not looking to re-hear it because the record has been made previously. Those were my rulings. I denied his motion. I denied his re-hearing. It was set for re-hearing after the denial, after the re-hearing without me agreeing to it. I'm denying the re-hearing. I don't think he is entitled to withdraw his plea for the reasons originally outlined.

(R 45). Clearly, the trial court was not entertaining this new information. Further, the district court did not discuss the claim defense counsel gave misadvice. Kalici, 24 Fla. L. Weekly D1714.

Respondent maintains that the amendment to Rule 3.172(c)(8) and State v. Sallato, 519 So. 2d 605 (Fla. 1988) require that he be permitted to withdraw his plea (R 25). The State disagrees.

It must be recognized that deportation consequences are collateral issues which do not form the basis for a claim of ineffective assistance of counsel. Fundora, 513 So. 2d 122 (finding deportation repercussions collateral and not a basis for a claim of ineffective assistance). Moreover, a defendant may not allege ineffective assistance of counsel in a conclusory manner. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989)(holding "motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief"). As such, additional hearings are not required on Respondent's request to withdraw his plea based upon a claim he was misadvised by his defense attorney even in light of Sallato, 519 So. 2d at 606 (finding evidentiary hearing necessary to determine whether defense counsel had given client affirmative misadvice regarding deportation). Because the July 21, 1998 affidavit was filed after the motion for rehearing was denied,

it was not before the trial judge properly and could be rejected as a matter of course. Further, the claim presented in the original petition for writ of error coram nobis merely alleged defense counsel did not advise Respondent of possible deportation. This was a conclusory statement and clearly, under the case law addressing a defense counsel's responsibility to inform his client of the collateral deportation consequences, no relief is required. Respondent has not shown the result of the proceeding would have been different; in other words, Respondent has not established he would have been acquitted had he gone to trial. As such, the district court's decision should be quashed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellant requests respectfully this Court QUASH the order of the district court and remand the matter for reinstatement of the trial court's denial of the petition for writ of error coram nobis.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Appellant" has been furnished by courier, to: NEAL A. DUPREE, ESQ., Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, 4th Floor, Fort Lauderdale, FL 33301 and to NEAL A. DUPREE, ESQ., Law Offices of Neal A. Dupree, 440 South Andrews Avenue, Fort Lauderdale, FL 33301 on March 24, 2000.

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