IN THE SUPREME COURT OF FLORIDA

DAVID HERNANDEZ RODRIGUEZ,

Petitioner,

v. **CASE NO. 96,794**

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON MERITS

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CERTIFICATE OF SIZE AND STYLE OF FONT

Your undersigned hereby certifies that the size and style of font used in this brief is 12-point Courier New, a font that is not proportionately spaced. And, if footnotes are published, the same size and style of font is used and the footnotes are single spaced.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as presented by Petitioner is essentially correct for purposes of this appeal.

SUMMARY OF THE ARGUMENT

In light of this Court's recent decision in Peart v. State, 25 Fla. L. Weekly S271 (Fla. Apr. 13, 2000), Petitioner's argument is not completely without merit. Petitioner did file a Fla.R.Crim.Pr. 3.850 motion in the trial court. The motion was denied; and, the Second District affirmed in Rodriguez v. State, 742 So.2d 422 (Fla. 2d DCA 1999). Pursuant to Peart, Petitioner is entitled to return to the trial court asserting a violation of Florida Rule of Criminal Procedure 3.172(c)(8) as a basis for post-conviction relief. Petitioner will not have to establish that had he gone to trial he would most probably have been acquitted. Rather, Petitioner will be afforded an opportunity to establish that he did not know that his plea might result in deportation; that he has been threatened with deportation because of his plea; and, that had he known of the possible consequence of deportation he would not have entered the plea.

ISSUE I

WHETHER A RESIDENT ALIEN MAY WITHDRAW A 1990 NOLO CONTENDERE PLEA WHEN THE TRIAL COURT DID NOT INFORM THE DEFENDANT THAT HE COULD BE DEPORTED AS A CONSEQUENCE OF ENTERING HIS PLEA?

(As Stated by Respondent)

On or about November 11, 1990, Petitioner filed a *plea form* publishing that he was entering a nolo contendere plea which disposed of an arson charge which purportedly arose out of a domestic dispute. (R 111-113) On November 26, 1990, Petitioner entered his nolo contendere plea before Judge Carlton. (R 78-82) On November 18, 1997, the federal government informed Petitioner that he was subject to deportation as a consequence of his plea. (R 83) Petitioner filed an emergency Fla.R.Crim.Pr. 3.850 motion in the state trial court seeking to withdraw his plea. (R 66-70) In the body of the motion, the prosecutor gave Petitioner's counsel permission to publish the parties' stipulation that the Petitioner had not been informed that he was subject to deportation when he entered his plea. (R 67-68) Judge Blackwell heard argument on the Motion to Vacate. (R 130-152)

The trial court denied relief on the basis of Peart v. State, 705 So.2d 1059 (Fla. 3d DCA 1998). Judge Blackwell ruled:

> THE COURT: Well, after reading these cases, I am persuaded by the Peart case, P-e-a-r-t, at 23 Florida Law Weekly 514, that regardless of what you chose to call this pleading, whether it's a petition for writ for Coram Nobis or position judgments Petition for Relief, it is bound by the rules of criminal procedure, and since this doesn't raise evidentiary issues in connection with the plea, it raises legal issues. I somewhat reluctantly conclude that I have to reverse the previous order, grant the Motion for Rehearing, and rescind the court's previous order.
>
> (R 149-50)

Petitioner then prosecuted a collateral appeal in the court below; and, Judge Blackwell's order denying Fla.R.Crim.Pr. 3.850 relief was per curiam affirmed in Rodriguez v. State, 742 So.2d 422 (Fla. 2d DCA 1999)[Case 1]. This memorandum decision reads:

> Affirmed. *See Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA), *rev. granted*, 722 So.2d 193 (Fla. 1998)(pending on certified conflict).
>
> (Text of 742 So.2d at 422)

This Court entered an order accepting jurisdiction and dispensing with oral argument on March 13, 2000.

This case is controlled by this Court's decision in Peart v. State, 25 Fla. L. Weekly S271 (Fla. Apr. 13, 2000). Two weeks

later, this Court disposed of the following pending cases on the basis of Peart. See, Rubio v. State, 25 Florida Law Weekly S328a (Fla. Apr. 27, 2000); State v. Lackman, 25 Florida Law Weekly S328b (Fla. Apr. 27, 2000); State v. Gregersen, 25 Florida Law Weekly S328c (Fla. Apr. 27, 2000); Romero v. State, 25 Florida Law Weekly S328d (Fla. Apr. 27, 2000); State v. Luders, 25 Florida Law Weekly S329a (Fla. Apr. 27, 2000); and, Van Tuyn v. State, 25 Florida Law Weekly S329b (Fla. Apr. 27, 2000).

This Court has instructed that all claims filed subsequent to this Court's decision in Wood v. State, 750 So.2d 592 (Fla. 1999) (time limits contained in Fla.R.Crim.Pr. 3.850 apply to petitions for writ of error coram nobis) must be filed pursuant to Fla.R.Crim.Pr. 3.850. See, Peart v. State, 25 Fla. Law Weekly at S273. The Wood decision was filed on May 27, 1999.

Petitioner was a noncustodial defendant who was not advised of the immigration consequences of his plea. His claim was addressed in a Fla.R.Crim.Pr. 3.850 motion. (R 66-70) In Peart, this Court has held that defendants shall have two years to file pleadings alleging a violation of Florida Rule of Criminal Procedure 3.172(c)(8) which requires that a trial court advise defendants of the possibility of deportation as a consequence to entering either a plea of nolo contendere or guilty. Thus, it

would appear that the decision below should be quashed as being inconsistent with this Court's decision in Peart. However, once Petitioner returns to the trial court he does not have to prove a likely acquittal at trial to obtain relief; however, he must prove prejudice resultant from the error. See, Peart v. State, 25 Fla. Law Weekly at S274-273:

> ... In order to show prejudice pursuant to a rule 3.172(c)(8) violation, defendants had to establish that they did not know that the plea might result in deportation, that they were "threatened" with deportation because of the plea, and that had they known of the possible consequence they would not have entered the plea. *See Perriello*, 684 So.2d at 259 (holding prejudice shown where defendant was "threatened" with deportation); *Marriott*, 605 So.2d at 987 (Holding that "threat" of deportation of alien was a sufficient showing of prejudice in such cases); *De Abreu*, 593 So.2d at 234 (holding that the defendant's allegation in a rule 3.850 motion that the trial court violated rule 3.172(c)(8), and that the defendant was subsequently surprised by the "threat" of deportation, constituted a sufficient showing of prejudice to justify an evidentiary hearing. [footnote 6 omitted]. Accordingly, based on establish precedent, in order to obtain relief from an alleged rule 3.172(c)(8) error, defendants are not required to prove a probable acquittal at trial.

(Text of 25 Fla. L. Weekly at S273)

Respondent would pause to point to People v. Davidovich, 606 N.W.2d 387 (Mich.Ct.App. 1999) where Tuvia Davidovich, a citizen

of Israel, moved to withdraw his guilty plea after he learned his conviction made him subject to deportation under federal immigration laws. There, Mr. Davidovich alleged that his trial counsel was ineffective in failing to explain the potential immigration consequences of a plea. The Michigan court held that counsel need only inform his client of the direct consequences of a guilty plea. The danger of deportation is a collateral consequence; and, in Michigan, trial counsel is not required to advise his client that he could be deported because of a plea-based conviction. The decision relies on both state and federal authority holding that counsel's failure to properly advise of collateral consequences of a plea does not bear on whether a defendant properly understood the decision to plead guilty to the charges in question. See, People v. Davidovich, 606 N.W.2d 387, 390 fn 5 (Mich.Ct.App. 1999).

That said, it would appear that the issue before this Court, in light of Peart, is not completely without merit.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the "State" would pray that this Court would make and render an Opinion consistent with this Court's decision in Peart v. State, 25 Fla. L. Weekly S271 (Fla. Apr. 13, 2000).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Neil D. Kolner, Esq., Liberty Building, 124 South Miami Avenue, Miami, FL 33130-1605 and Michael Provost, Assistant State Attorney, Office of the State Attorney, Administration Building, 3301 Tamiami Trail East, 6th Floor, Naples, Florida 34112 on this _____ day of May, 2000.

_____

OF COUNSEL FOR RESPONDENT