

IN THE SUPREME COURT
STATE OF FLORIDA

CASE No. SC96,794

DAVID HERNANDEZ RODRIGUEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

INITIAL BRIEF ON THE MERITS
OF
DAVID HERNANDEZ RODRIGUEZ

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

LAW OFFICE OF MICHAEL D. RAY
By: NEIL D. KOLNER, ESQ.
Liberty Building
124 South Miami Avenue
Miami, Florida 33130-1605
(305) 377-9000
Fax: (305) 377-9100
Florida Bar No. 747335

Counsel for

TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW

I. Whether a defendant now facing deportation for a criminal conviction and who pled nolo contendere but was never advised that his plea could lead to deportation shows the requisite prejudice to permit the withdrawal of his involuntary plea and the vacation of his conviction?

II. Where a trial court denies a defendant’s motion to withdraw a nolo contendere plea and vacate conviction solely because of a District Court of Appeal decision which has now been quashed by this Court, must the trial court’s denial and District Court of Appeal affirmance thereof also be quashed?

TABLE OF CITATIONS iii

CERTIFICATE OF FONT SIZE iv

REFERENCE TABLE FOR ALL ABBREVIATIONS USED IN THIS BRIEF iv

STATEMENT OF THE CASE AND OF THE FACTS 1

Nature of the Case 1

COURSE OF THE PROCEEDINGS 2

The Charge 2

The Nolo contendere Plea **2**
The Judgment and Sentence **3**

TABLE OF CONTENTS (cont'd)

COURSE OF THE PROCEEDINGS (cont'd)

Sentence Completed 3

U.S. Immigration & Naturalization Service seeks Deportation . 3

The Motion to Withdraw Plea and Vacate Conviction 4

*The April 15, 1998 Order Withdrawing Plea
and Vacating Conviction* 5

The Rehearing: Order rescinding the April 15, 1998 Order . . . 5

Disposition in the Trial Court 5

DISPOSITION BY THE DISTRICT COURT OF APPEAL 6

SUMMARY OF ARGUMENT 6

ARGUMENT 7

**I. A DEFENDANT NOW FACING DEPORTATION FOR A CRIMINAL
CONVICTION AND WHO PLED NOLO CONTENDERE BUT WAS NEVER
ADVISED THAT HIS PLEA COULD LEAD TO DEPORTATION SHOWS THE
REQUISITE PREJUDICE TO PERMIT THE WITHDRAWAL OF HIS
INVOLUNTARY PLEA AND THE VACATION OF HIS CONVICTION** 7

**II. WHERE A TRIAL COURT DENIES A DEFENDANT'S MOTION TO
WITHDRAW A NOLO CONTENDERE PLEA AND VACATE CONVICTION
ONLY BECAUSE OF A DISTRICT COURT OF APPEAL DECISION WHICH
HAS NOW BEEN QUASHED BY THIS COURT, THE TRIAL COURT
DENIAL AND DISTRICT COURT OF APPEAL AFFIRMANCE MUST ALSO
BE QUASHED** 9

CONCLUSION 10

CERTIFICATE OF SERVICE 10

TABLE OF CITATIONS

Cases: Page:

In Re: Amendments to Florida Rules of Criminal Procedure,
536 So.2d 992 (Fla. 1988) 4

Ng Fung Ho v. White,
259 U.S. 276 (1921) 8

Peart v. State,
705 So.2d 1059 (Fla. 3d DCA 1998) 1, 2, 6, 9

Peart v. State,
25 Fla. L. Weekly S271 (Fla. April 13, 2000) 2, 7

Rodriguez v. State,
742 So.2d 422 (Fla. 2d DCA 1999) 1, 9

Constitutional provisions:

Art. I § 9 Fla. Const. 9

Art. V. §3(b)(3) Fla. Const. 2

Statute:

§ 806.01(1) Fla. Stat. 2

Rules:

Fla. R. App. P. 9.030(a)(2)(A)(iv) 2

Fla. R. Crim. P. 3.172(c)(8) 1, 2, 4, 7

Fla. R. Crim. P. 3.172(i) 4, 7
Fla. R. Crim. P. 3.850 4

CERTIFICATE OF FONT SIZE

Counsel certifies the size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

REFERENCE TABLE FOR ALL ABBREVIATIONS USED IN THIS BRIEF

References to the record are in the form "R-" followed by the page of the Master Index to Record on Appeal assigned by the Clerk of the Circuit Court for Collier County, Florida.

The Petitioner, David Hernandez Rodriguez is variously referred to as Mr. Rodriguez or David Rodriguez.

The Respondent, the State of Florida, is referred to as such.

STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case

David Hernandez Rodriguez appeals the denial of his post-conviction motion to withdraw plea and vacate conviction due to a trial judge's failure to advise that deportation is a possible consequence of a plea of nolo contendere, contrary to Florida Rule of Criminal Procedure 3.172(c)(8).

The Second District Court of Appeal affirmed the trial court's denial of Mr. Rodriguez's motion to withdraw his plea and to vacate conviction, expressly because of the *en banc* decision in *Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA 1998).

The Collier County Circuit Court had earlier granted his motion to withdraw plea and vacate his conviction because it found David Rodriguez had suffered substantial prejudice and because the United States Immigration and Naturalization Service seeks to deport him for that conviction. R-121-122. APPENDIX-1

Relying on the Third District Court of Appeal's then-new *en banc* decision in *Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA 1998), the State of Florida sought rehearing, and based on *Peart*, the trial court rescinded its order. APPENDIX-2

On David Hernandez Rodriguez's appeal, the Second District Court of Appeal affirmed, Per Curiam, citing *Peart v. State*, 705 So.2d 1059 (Fla. 3d DCA), *rev. granted* 722 So. 2d 193 (Fla.

1998)(pending on certified conflict). *Rodriguez v. State*, 742 So.2d 422 (Fla. 2d DCA 1999). APPENDIX-3

This Court granted review on March 13, 2000 under its discretionary conflict jurisdiction because *Peart v. State*, was pending before this Court.^{1/}

On April 13, 2000, this Court quashed the Third District's *Peart* decision. 25 Fla. L. Weekly S271 (Fla. April 13, 2000).

Course of the Proceedings

The Charge

The State of Florida charged David Rodriguez with second degree arson in March, 1990. R-1 He entered a written plea of not guilty through former counsel on March 28, 1990. R-11. The State of Florida filed an information changing the charge to "arson of a dwelling", § 806.01(1) Fla. Stat. on May 18, 1990. R-15.^{2/}

The Nolo contendere Plea

Through former counsel, David Rodriguez entered a plea of nolo contendere to a second degree felony, a lesser included charge

¹ See: Art.V. §3(b)(3) Fla. Const. and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

² Fire burned a portion of an unoccupied house owned by David Rodriguez; the residence of his wife, Sarah Rodriguez. The house at 509 N. 16th Street, Immokalee sustained damage estimated at \$10,000.00. R-2 and R-21.

of arson under § 806.01(2) Fla. Stat. R-73. However, the trial court judge failed to explain to David Rodriguez, as mandated by Rule 3.172(c)(8), Fla.R.Crim.P., that by accepting the nolo contendere plea he could subject himself to deportation.^{3/}

The Judgment and Sentence

Pursuant to the plea agreement, the trial judge adjudicated Mr. Rodriguez guilty of second degree arson, imposed a sentence of one year community control with three years probation plus costs and restitution on November 26, 1990. R-30-31.

Because David Rodriguez is a crew leader for a farming enterprise, he requested modification of his community control to permit him to travel following Florida's winter vegetable season. R-37. Accordingly, the trial court modified his sentence, converting the balance of community control to probation. R-41.

Sentence Completed

The court modified David Rodriguez's probation to allow him to pay a fine in lieu of completion of remaining public service program hours. His probation was ultimately terminated in December, 1994. R-64.

³ The State of Florida concedes that the plea colloquy shows this R-67 R-71-77.

U.S. Immigration & Naturalization Service seeks David's Deportation

In August, 1997, the United States Immigration & Naturalization Service served David Rodriguez with a "Notice to Appear" in removal proceedings^{4/} R-83. The "Notice to Appear" was amended on February 10, 1998, and charged that David Rodriguez "should show why [he] should not be removed from the United States" based only on the conviction in the instant case. R-83 Mr. Rodriguez has been a lawful permanent resident of the United States (green card holder) since November 16, 1978 [R-85] and is the father of eight United States citizen children. R-87-107

The Motion to Withdraw Plea and Vacate Conviction

Due to the trial court's failure to explain to David Rodriguez that his nolo contendere plea could subject him to being deported from the United States^{5/} David Rodriguez filed a comprehensive Motion to Withdraw Plea and Vacate Conviction on March 26, 1998 accompanied with a memorandum of law.^{6/} R-66 through 120. The motion

⁴ Proceedings before the Executive Office for Immigration Review used to be called "deportation" rather than "removal".

⁵Since January 1, 1989, Rule 3.172(c)(8) of the Florida Rules of Criminal Procedure has mandated that "**this admonition shall be given to all defendants in all cases**" - "it shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen. *Id.* R-109. *In Re: Amendments to Florida Rules of Criminal Procedure*, 536 So.2d 992, 993 (Fla. 1988) (emphasis added).

⁶ The motion was brought under Fla.R.Crim.P. 3.172(i) which says: "**(i) Prejudice. Failure to follow any of the procedures in**

was accompanied by David Rodriguez' sworn affidavit which detailed that no one had explained he could be deported for entering the plea, and that if he had known he could be deported, he never would have entered the nolo contendere plea. R-114.

this rule shall not render a plea void absent a showing of prejudice." (Emphasis added). The motion was neither a petition for writ of error coram nobis, nor a Fla.R.Crim.P. 3.850 motion.

The April 15, 1998 Order Withdrawing Plea and Vacating Conviction

Based upon the stipulation of facts (that the trial court had not complied with its mandatory obligation to advise of immigration consequences in accepting a plea), the trial court entered an Order Granting Motion to Withdraw Plea and Vacate Conviction Based upon Stipulated Facts on April 15, 1998. R-121. APPENDIX-1

The State of Florida sought rehearing. R-124. Rehearing was granted, and a hearing was set before the trial court on May 5, 1998. R-126.

The Rehearing: Order rescinding the April 15, 1998 Order

Following legal arguments, the trial court "somewhat reluctantly conclude[d] that [it had] to reverse the previous order, grant the Motion for Rehearing, and rescind the court's previous order." The trial judge felt he was required to rescind his order based upon the Third District's *Peart* decision. R-150. APPENDIX-2 The Order was entered May 8, 1998 [R-127], and David Rodriguez filed a timely Notice of Appeal on June 5, 1998. R-128.

Disposition in the Trial Court

The trial court originally adjudicated David Rodriguez guilty of the charge of second degree arson in November, 1990. R-28. The trial court Granted David Rodriguez's Motion to Withdraw Plea and Vacate Conviction on April 15, 1998. R-121. On rehearing, the

trial court rescinded the April 15, 1998 Order and reinstated the judgment of conviction. R-127.

Disposition in The District Court of Appeal

The Second District Court of Appeal affirmed the trial court with a *Per Curiam* Affirmed decision on March 19, 1999. On David Rodriguez' motion for rehearing, clarification or certification, the District Court of Appeal granted the motion for clarification, and substituted the March 19, 1999 decision with the Order now on review which explicitly cites as controlling authority the *en banc* decision of the Third District in *Peart v. State*, 705 So.2d 193 (Fla. 3d DCA) *rev. granted* 722 So.2d 193 (Fla. 1998). APPENDIX-3.

SUMMARY OF ARGUMENT

1. A defendant now facing deportation for a criminal conviction and who pled nolo contendere but was never advised that his plea could lead to deportation shows the requisite prejudice to permit the withdrawal of his involuntary plea and the vacation of his conviction.

2. Where a trial court denies a defendant's motion to withdraw a nolo contendere plea and vacate conviction solely because of a District Court of Appeal decision which has now been quashed by

this Court, the trial court decision and District Court of Appeal
affirmance also deserve to be quashed.

ARGUMENT

I. A DEFENDANT NOW FACING DEPORTATION FOR A CRIMINAL CONVICTION WHO PLED NOLO CONTENDERE BUT WAS NEVER ADVISED THAT HIS PLEA COULD LEAD TO DEPORTATION SHOWS THE REQUISITE PREJUDICE TO PERMIT THE WITHDRAWAL OF HIS INVOLUNTARY PLEA AND THE VACATION OF HIS CONVICTION.

This Court recently clarified in *Peart v. State*, 25 Fla. L. Weekly S271 (Fla. April 13, 2000) that where, as here, a defendant like David Rodriguez was not advised by the trial court when accepting a nolo contendere plea that a possible consequence of such plea is deportation (as the trial judge is mandated by Florida Rule of Criminal Procedure 3.172(c)(8)), and the defendant is in fact, facing deportation, the defendant establishes the requisite "prejudice" contemplated by Florida Rule of Criminal Procedure 3.172(i) allowing the plea to be withdrawn, and the resulting conviction to be vacated. *Peart*, 25 Fla. L. Weekly at S272.

Here, the State of Florida has stipulated that David Rodriguez was not advised by the trial court that his plea could subject him to being deported. R-67

The trial judge also accepted the fact that David Rodriguez is facing deportation because of his plea in this case. R-122, R-83. David Rodriguez submitted an affidavit setting forth the fact that

he never would have accepted the plea of nolo contendere if he had known that he would face deportation. R-114

If Mr. Rodriguez were deported or removed from the United States, it would permanently physically separate him from his eight United States citizen children and his United States citizen wife. R-87-107

Long ago, the Supreme Court of the United States explained that deportation "may result also in loss of property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1921).

Accordingly, Mr. Rodriguez has set forth a prima facie case to have his plea withdrawn, and his conviction vacated. The lower court's decisions were both based upon the Third District's *Peart v. State*, decision which this Court quashed on April 13, 2000.

Wherefore, the lower court's decisions founded on a now-quashed decision deserve to be quashed as well.

II. WHERE A TRIAL COURT DENIES A DEFENDANT'S MOTION TO WITHDRAW A NOLO CONTENDERE PLEA AND VACATE CONVICTION SOLELY BECAUSE OF A DISTRICT COURT OF APPEAL DECISION WHICH HAS NOW BEEN QUASHED BY THIS COURT, THE TRIAL COURT DENIAL AND THE DISTRICT COURT OF APPEAL AFFIRMANCE MUST ALSO BE QUASHED.

Both in the trial court and the District Court of Appeal, the sole basis for denying David Rodriguez's attempts to withdraw his plea and vacate his conviction is the now-quashed Third District's *Peart* decision, 705 So.2d 193 (Fla. 3d DCA) *rev. granted* 722 So.2d 193 (Fla. 1998). R-149-150; *Rodriguez v. State*, 742 So.2d 422 (Fla. 2d DCA 1999).

Florida's Constitution guarantees that "No person shall be deprived of life, liberty or property without due process of law. . . ." Art. I, § 9, Fla. Const.

The trial court order denying Mr. Rodriguez's motion deprived Mr. Rodriguez of the opportunity to vacate his conviction which was procured through an involuntary plea.

Now that the foundation for the Second District's opinion on review here has been quashed by this Court, for the same reason, so too, should the Second District's opinion be quashed in this case.

The trial court's order denying David Rodriguez the ability to withdraw his plea and to vacate his conviction similarly may not

stand in light of this Court's quashal of the Third District's decision in *Peart*.

CONCLUSION

Wherefore, for all the above grounds and reasons, both lower court's decisions in this case deserve to be quashed, with directions to reinstate the April 15, 1998 Order of the trial court withdrawing plea and vacating conviction.

Respectfully submitted,

LAW OFFICE OF MICHAEL D. RAY
By: NEIL D. KOLNER, ESQ.
Liberty Building
124 South Miami Avenue
Miami, Florida 33130-1605
(305) 377-9000
Fax: (305) 377-9100
Florida Bar No. 747335
Counsel for
DAVID HERNANDEZ RODRIGUEZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing with accompanying Appendix, and a DOS formatted 3-1/2" diskette containing the brief in the WordPerfect 8.0 format were caused to be mailed to the Clerk of the Supreme Court of Florida, and that a true and correct copy of the foregoing with accompanying Appendix was caused to be mailed this 8th day of May, 2000, to: WILLIAM I. MUNSEY, JR., ESQ., OFFICE OF THE FLORIDA ATTORNEY

GENERAL, CRIMINAL APPEALS SECTION, 2002 N LOIS AVE #700, TAMPA FL
33607-2366.

NEIL D. KOLNER, ESQ.