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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC99-39
Third District No. 3D99-2 196

RICARDO PEREZ,
Petitioner,
-vs-
THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal. The Petitioner, Ricardo Perez, was the Defendant and the Appellant, respectively. In this brief on the merits the Petitioner shall be referred by surname and the Respondent shall be referred to as "the State".

STATEMENT OF THE CASE AND FACTS

On November 16, 1993, in Circuit Court Case No. 93-36225, Perez was charged with possession of cocaine in violation of Fla. Stat. §893.13(1)(f). On February 18, 1994, in Circuit Court Case No. 94-3 193, Perez was charged by information with burglary, in violation of Fla. Stat. §§8 10.02(3) and 777.0 11 and petit theft, in violation of Fla. Stat. §8 12.0 14(1)(2)(d). On March 22, 1994, in Circuit Case No. 94-3 193, the State filed a "Notice of Intention to Seek Enhanced Penalty Pursuant to F.S. 775.084..." wherein the assistant state attorney certified that a true and exact copy of the notice was furnished to defense counsel on March 17, 1994.

On May 3, 1994, a plea hearing was held before the Honorable Bernardo Shapiro. At the hearing, Perez pled no contest and requested a furlough before his incarceration was to begin. The trial court sentenced Perez to thirty-five years in prison as an habitual felony offender for the burglary and petit theft convictions, and then granted him a one-week furlough, on the condition that if he returned by a given date the court would mitigate his sentence to five years on the burglary and petit theft convictions, instead of imposing thirty-five years as an habitual felony offender. Perez failed to return from his furlough and was later picked up by police. The trial court issued a commitment order and sentenced Perez to thirty-five years as an habitual offender on the burglary and petit theft convictions and also to thirty-five

years on the cocaine possession case, both sentences to be served concurrently.

Defendant appealed to the Third District Court of Appeal. On December 2 1, 1994, in Third DCA Case No. 94-1457, the court reversed Perez's thirty-five year sentence as it related to the possession of cocaine charge and the habitual offender status as it related to that same charge. Perez's sentence was affirmed in all other respects.'

On April 17, 1995, in Circuit Court Case No. 94-3 193, Perez filed a motion to correct illegal sentence pursuant to Fla. R. Crim. P. 3.800. Perez claimed: (1) the habitual offender statute did not permit enhanced sentencing where the felonies for which Perez was to be sentenced were violations of the burglary and petit theft statutes; (2) the sentence which the trial court imposed violated the "original" plea agreement; (3) the prosecutor misled the trial court by using the defendant's " 198 1" and " 1982" convictions to habitualize him; (4) the trial court erred in not sentencing Perez to a sentence within the guidelines and that (5) Perez was not served with notice of the State's intent to habitualize him. On June 28, 1995, the trial court denied the motion.

Although undersigned counsel has a copy of the court's opinion, Third DCA Case No. 94-1457, the State's file does not contain a copy of either the Appellant's initial brief or the Appellee's answer brief. Undersigned counsel submits that they are not necessary to resolution of the issues before this Court.

Defendant appealed the denial of his motion to the Third District Court of Appeal and filed an initial brief, on September 29, 1995, in which he claimed that the trial court erred in imposing a harsher sentence when Perez failed to return from furlough and the trial court erred in imposing a harsher sentence because defense counsel representing Perez during the hearing, after he was picked up by police, did not have knowledge of the previous plea agreement. After the State filed its response, Perez moved to voluntarily dismiss his appeal, which the district court granted on November 1, 1995.

On November 14, 1995, Perez filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, in which he asserted the following claims:

> I. DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.
>
> II. TRIAL COURT ERRED IN ADJUDICATING DEFENDANT GUILTY OF THE CHARGE OF BURGLARY WHEN THE ELEMENTS OF THE CRIME DOES [SIC] NOT MEET THE CRITERIA OF BURGLARY, THE PROPER CHARGE IS TRESPASSING.
>
> III. TRIAL COURT ERRED IN SENTENCING DEFENDANT TO THIRTY-FIVE (35) YEARS HABITUAL OFFENDER FOR A SECOND DEGREE FELONY. STATUTORY MAXIMUM COULD ONLY BE THIRTY (30) YEARS WHEN FOUND TO BE AN HABITUAL FELONY OFFENDER.

In his memorandum of law, Perez asserted that had trial counsel investigated the facts he would have become aware that the facts did not support a charge of burglary. On February 13, 1996, in a written order, the trial court denied the Perez's motion finding that the issues raised in the motion could have, should have, or were raised on direct appeal. On February 26, 1996, the Perez filed a notice of appeal to the Third District Court of Appeal. On March 27, 1996, the Third DCA affirmed the order of the trial court. On April 4, 1996, Perez moved for rehearing. The district court denied rehearing on April 17, 1996, and a mandate issued on May 3, 1996.

On September 1, 1999, Perez filed at "Petition for Writ of Error Coram Nobis/Habeas Corpus" in the Third District Court of Appeal. The district court denied relief based on the authority of its prior decision in *Pert v. State, 705 So.* 2d 1059 (Fla. 3rd DCA 1998). 0 n November 18, 1999, Perez filed a motion to invoke the discretionary jurisdiction of this Court. On March 13, 2000, this Court issued an order accepting jurisdiction and dispensing with oral argument. This respondent's brief on the merits follows pursuant to the order of this Court.

In his petition, the Defendant raises the following issues [verbatim]:

> I. PETITIONER PLED NOLO CONTENDERE TO A NONEXISTENT CRIME.
>
> II. DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

III. DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

IV. DENIED THE FUNDAMENTAL RIGHT TO A SWORN INTERPRETER FOR PURPOSES OF PLEADING NOLO CONTENDERE.

On August 3 1, 1999, the Third DCA ordered a response from the State.

QUESTIONS PRESENTED

I.

NOTWITHSTANDING THE TRIAL COURT'S FAILURE TO FOLLOW THE REQUIREMENTS OF FLA. R. CRIM P. 3.172(c)(8), IS CORAM NOBIS RELIEF AVAILABLE TO A PETITIONER WHO FILES A LEGALLY INSUFFICIENT PETITION FOR THE WRIT?

II

WHETHER RULE 3.850'S TWO YEAR PERIOD OF LIMITATIONS APPLIES TO PETITIONS FOR WRIT OF CORAM NOBIS.

III

WHETHER A DEFENDANT MUST ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL TO OBTAIN RELIEF UNDER FLA, R. CRIM. P. 3.172(c)(8).

SUMMARY OF THE ARGUMENTS

I

Petitioner Perez contends that the district court of appeal erred in denying his petition for coram nobis relief on the ground that the trial court failed to advise him of the immigration consequences of his pleas. The State submits that it is not sufficient for Perez to simply make bald assertions. Perez is not entitled to coram nobis relief because he asserts error and prejudice but no facts in support of his allegations. However, the fact that the plea colloquy was deficient is not in itself a sufficient basis to permit withdrawal of the plea after sentencing absent the defendant alleging specific facts which establish prejudice or manifest injustice.

II

As the second point of error for review, Perez contends that Fla. R. Crim. P. 3.850% two year time limitations should not be imposed upon petitions for the writ of coram nobis. The State respectfully submits that this Court's opinion in *Wood v. State,* 24 Fla. L. Weekly S240, 241 was correct in concluding that unless the time limits contained in rule 3.850 are applied to petitions for writ of error coram nobis, the writ could be used to circumvent the rule.

III

Finally, as issue, three Perez argues that he should not be required to assert and prove probability of acquittal at trial to secure relief from an involuntary plea As this Court has already held in *Pert v. State,* 25 Fla. L. Weekly S271a, defendants are not required to prove a likely acquittal at trial to obtain relief under rule 3.172(c)(8). Therefore, the State respectfully submits that this point is moot.

ARGUMENT

I.

WRIT OF ERROR CORAM NOBIS RELIEF IS NOT AVAILABLE TO THE PETITIONER DESPITE THE TRIAL COURT'S FAILURE TO FOLLOW THE REQUIREMENTS OF FLA. R. CRIM. P. 3.172(c)(8), BECAUSE THE PETITION FOR THE WRIT IS LEGALLY INSUFFICIENT.

Petitioner Perez contends that the district court of appeal erred in denying Perez's petition for coram nobis relief on the ground that the trial court failed to advise Perez of the immigration consequences of his pleas. The State submits that Perez is not entitled to coram nobis relief for the following reasons.

In *Wood v. State,* 24 Fla. L. Weekly S240 (Fla. May 27, 1999) the Florida Supreme Court cited with approval *Vonia v. State, 680* So.2d 438 (Fla. 2d DCA 1996), finding that the principles therein are still applicable to coram nobis claims, in spite of holding that a two-year limitation applied to petitions for the writ and deleting the "in custody" requirement of Rule 3.850. Furthermore, this Court reiterated the well-settled principle that the function of a writ of error coram nobis is to correct errors of fact, not errors of law. The facts upon which a petition is based must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by

the use of diligence. *Id.*

In the matter *sub judice* Perez asserts error and prejudice but no facts in support of his allegations. For example, Perez has never pleaded in this or any lower tribunal facts which establish when the threat *or* actual commencement of deportation proceedings by the Immigration and Naturalization Service commenced against him. Nor does he proffer when he became aware of a threat or initiation of deportation proceedings. Instead, Perez contends only that the trial judge failed to inform him of the consequences of his pleas and that this omission therefore entitles him to withdraw his plea. However, the fact that the plea colloquy was deficient is not in itself a sufficient basis to permit withdrawal of the plea after sentencing. It is the defendant's burden to establish prejudice or manifest injustice. *State v. Ginebra,* 5 11 So.2d 960 (Fla.1987). It is not sufficient for Perez to simply make bald assertions. *State* v. *Caudle,* 504 So.2d 419,421 (Fla. 5th DCA 1987); *State v. Fox, 659* So.2d 1324, 1324 (Fla. 3 DCA 1995).

II

UNLESS THE TIME LIMITS CONTAINED IN RULE 3.850 ARE APPLIED TO PETITIONS FOR WRIT OF ERROR CORAM NOBIS, THE WRIT COULD BE USED TO CIRCUMVENT THE RULE.

As the second point of error for review, Perez contends that Fla. R. Crim. P. 3.850's two year time limitations should not be imposed upon petitions for the writ of coram nobis. The State respectfully submits that this Court's opinion in *Wood v. State,* 24 Fla. L. Weekly S240, 241 was correct in concluding that unless the time limits contained in rule 3.850 are applied to petitions for writ of error coram nobis, the writ could be used to circumvent the rule. In *Wood* this Court held that as of the date of that decision writs of error coram nobis would be subject to the two-year limitation provided in rule 3.850, even though pre- *Wood* petitions were not subject to a like limitation.

Limiting claims cognizable under coram nobis to the same time limit that is applied to rule 3.850 motions places both such claimants on equal footing and prevents unwarranted circumvention of the rule. The discovery of facts giving rise to a coram nobis claim should continue to be governed by the due diligence standard. That is to say that, "[I]t must appear that defendant or his counsel could not have known [of the alleged facts] by the use of diligence." To hold otherwise would

permit defendants to breathe life into post-conviction claims that have previously been held time-barred. *See Vonia v. State,* 680 So. 2d 438, 439 (Fla. 2d DCA 1996).

III

PURSUANT TO THIS COURT'S HOLDING IN *PERT v. STATE,* 25 FLA. L. WEEKLY S271A, THAT DEFENDANTS DO NOT HAVE TO PROVE A LIKELY ACQUITTAL AT TRIAL TO OBTAIN RELIEF UNDER RULE 3.172(C)(8); RATHER, THEY MUST PROVE PREJUDICE RESULTANT FROM THE ERROR, THE THIRD ISSUE RAISED BY THE PETITIONER IS MOOT.

As issue three Perez argues that, "[A] defendant should not be required to assert and prove probability of acquittal at trial to secure relief from an involuntary plea resulting from the trial court's failure to advise the defendant of adverse immigration consequences." (Petitioner's Brief on the Merits at 20). As this Court has already held in *Pert v. State,* 25 Fla. L. Weekly S271 a, defendants are not required to prove a likely acquittal at trial to obtain relief under rule 3.172(c)(8), therefore, the State respectfully submits that this point is moot.

CONCLUSION

Based upon the foregoing arguments and authorities the Respondent submits that the Petitioner, Ricardo Perez, is not entitled to coram nobin relief. Accordingly, the Respondent requests that this Court affirm the order of the Third District Court of Appeal denying the petition for a writ of error coram nobis.

Respectfully submitted,

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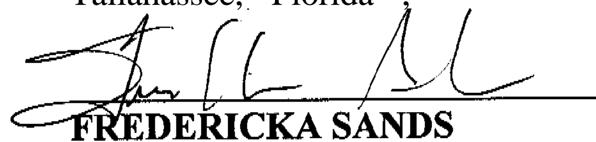
Tallahassee, Florida



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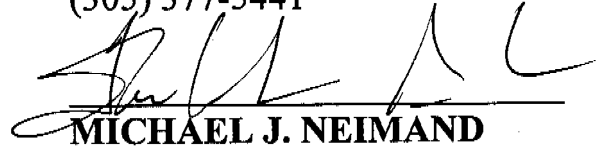

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief utilizes 14 point Times New Roman and contains a line count of 337.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Clarification was mailed this 24th day of May, 2000 to the *pro* se Peritonea, Ricardo Perez, DC# 3 84899, 4455 Sam Mitchell Drive, Washington Correctional Institution, Chipley, Florida 32428.

FREDERICKA SANDS
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC99-39
Third District No. 3D99-2 196

RICARDO PEREZ,
Petitioner,
-vs-
THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

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INDEX TO APPENDIX

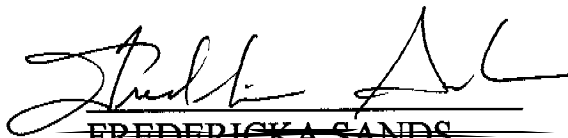
<u>DESCRIPTION</u>

Exhibit A Opinion,

Perez *v. State, No. 99-2* 196 (Fla. 3rd DCA Nov. 9, 1999)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to Brief of Respondent on the Merits was mailed this 24th day of May, 2000 to the *pro* se Petitioner, Ricardo Perez, DC# 384899, 4455 Sam Mitchell Drive, Washington Correctional Institution, Chipley, Florida 32428.



FREDERICKA SANDS
Assistant Attorney General

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1999

NOVEMBER 9, 1999

RICARDO PEREZ, CASE NO.: 99-2196

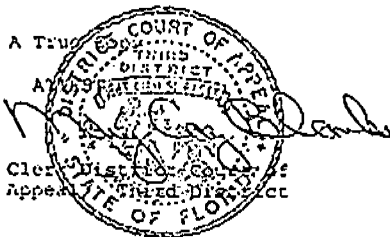
Appellant(s)/Petitioner(s),

vs.

MICHAEL W. MOORE, SEC. OF FL. DEPT. OF CORR., ETC., Appellee(s)/Respondent(s).

LOWER TRIBUNAL NO. 93-36225

Following review of the petition for writ of error coram nobis/habeas corpus and the response 'and reply thereto, it is ordered that said petition is hereby denied. See Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA 1998), review granted, 722 So. 2d 193 (1998). NESBITT, COPE and SORONDO, JJ., concur.



cc:
Ricardo Perez
Christine E. Zahralban
Hon. Sidney B. Shapiro

la