IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-234
Third District No. 3D99-0262

RUBY CAJAYON SOMINTAC,
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

ROBERT A. BUTTERWORTH
Attorney General

FREDERICKA SANDS
Assistant Attorney General
Florida Bar No. 0894620
Office of the Attorney General
444 Brickell Avenue, Suite 950
Miami, Florida 33131
Telephone: (305) 377-5441

MICHAEL J. NEIMAND
Assistant Attorney General
Bureau Chief Criminal Appeals
Florida Bar Number 0239437

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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, Ruby Cajayon Somintac, was the Defendant and the Appellant, respectively. In this brief on the merits the Petitioner shall be referred to "Somintac" and the Respondent shall be referred to as "the State". Citations to the record are abbreviated as follows:

"R"- followed by the page number corresponding to the Clerk's Record on Appeal filed in the Third District Court of Appeal.

"A"- Appendix attached hereto containing Third DCA opinion

STATEMENT OF THE CASE AND FACTS

The State accepts Somintac's statement of the case and facts as presented at pages 2 through 3 of the original "Motion to Affirm with Express Citation to Pert v. State", 705 So. 2d 1059 (Fla. 3rd DCA 1998) filed in the district court as a generally accurate account of the proceedings below. Any additional facts which the State seeks to bring to the attention of the Court are contained in the argument portion of this brief.

QUESTION PRESENTED

I.

WHETHER THE WRIT OF ERROR CORAM NOBIS MAY BE USED BY A PERSON NO LONGER IN CUSTODY WHO FAILED TO EXHAUST ALL POSTCONVICTION RELIEF REMEDIES AVAILABLE WHILE SERVING A TERM OF INCARCERATION AS A STATE PRISONER?

SUMMARY OF THE ARGUMENT

Although Somintac had the opportunity to do so, Somintac never filed a Rule 3.850 postconviction relief motion during the 2 years he was in the State's custody. After serving his sentence Somintac filed a petition for writ of error coram nobis in the trial court. The State submits that Somintac's petition for the writ of error coram nobis should be denied now that he is no longer in custody because Somintac could have, but failed to, utilize the appropriate postconviction Rule 3.850 remedy available while in custody. Thus, the availability of Rule 3.850 relief renders coram nobis an improper remedy because Somintac had other relief available.

ARGUMENT

I.

THE WRIT OF ERROR CORAM NOBIS CANNOT BE USED BY A PERSON NO LONGER IN CUSTODY WHO FAILED TO EXHAUST ALL POSTCONVICTION RELIEF REMEDIES AVAILABLE WHILE SERVING A TERM OF INCARCERATION AS A STATE PRISONER.

The State contests Somintac's claim that he is entitled to coram nobis relief. 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. *Wood*, 24 Fla.L.Weekly at 3. 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* Somintac does not seek coram nobis relief asserting errors of fact or newly discovered evidence, but rather on the basis of an error of law, to wit, an irregularity in his plea colloquy rendering the pleas involuntary. *Somintac v. State*, 24

Fla. L. Weekly D2241, (Fla. 3rd DCA 1999) citing *State v. Garcia,* 571 So.2d 38 (Fla. 3d DCA 1990). Moreover, Somintac's petition for relief do not assert claims "of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment." *Somintac*. Coram nobis relief, therefore, is not the appropriate remedy.[1]

In *Vonia*, while the defendant was serving a five year sentence, but after the expiration of the two year time limitation of Florida Rule of Criminal Procedure 3.850, he filed a petition for writ of error coram nobis. While the petition was pending, the defendant's sentence expired. Had he filed a Rule 3.850 motion instead of a coram nobis claim, he would have been procedurally barred. The *Vonia* court approved the denial of the defendant's coram nobis claim because he was not denied a remedy that would be available to him had he still been incarcerated. The court reasoned that "the writ of error coram nobis cannot be used by a person no longer in custody to breathe life into a postconviction claim previously time barred." *Id.* In effect, the *Vonia* court held that a petitioner cannot be afforded the opportunity to file a Rule 3.850 motion while incarcerated *and* then subsequently be permitted to file a petition for writ of error coram

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[1]Curiously Somintac offers no proof by way of objective fact to explain his failure to file a motion for postconviction relief and nothing on the face of the record refutes the conclusion that Somintac knew or could have known that a motion for postconviction relief was the appropriate remedy.

nobis when he is no longer in custody, while a petitioner who remains "in custody" is only permitted one bite of the apple by being limited to the sole remedy of filing a postconviction motion pursuant to Rule 3.850.

In *Peart v. State*, 705 So.2d 1059 (Fla. 3rd DCA 1998), *rev. granted*, 722 So.2d 193 (Fla. 1998), The Third District Court also relied on *Vonia* when it held that "the availability of 3.850 relief renders coram nobis an *improper remedy* because defendants had other relief available" where those defendants were ordered to serve two years probation and eighteen months probation, respectively. (Emphasis in the original). The State is cognizant of the Third District Court of Appeal opinion in *Bartz v. State*, (99-1129 3rd DCA September 1, 1999) and respectfully submits that the *Bartz* decision is in conflict with *Pert* and reaches the an incorrect result because the *Bartz* opinion does not apply the *Vonia* principles cited with approval in *Peart*.

Under the proper *Vonia* analysis both Bartz and Somintac are precluded from coram nobis relief because they failed to utilize the appropriate Rule 3.850 remedy available while in custody. To now allow either person the benefit of coram nobis after each voluntarily forfeited Rule 3.850 relief is to permit a legally unauthorized "second bite of the apple".

Somintac was sentenced to two years probation with special conditions that he serve 60 days in jail, 100 community service hours, and submit to a Mentally Disordered

Sex Offender (MDSO) evaluation and treatment if necessary. (R. 28). Although Somintac had every opportunity to do so, Somintac never filed a Rule 3.850 postconviction relief motion, but rather after serving his sentence filed a petition for writ of error coram nobis in the trial court. Under the principals of *Vonia*, the prior availability of 3.850 relief while appellant was in custody renders coram nobis relief an improper remedy.

In its unsuccessful motion for rehearing in the Third District Court the State submitted that the court misapprehended the point of law urged by the State in its response to Somintac's appeal. In its September 29, 1999, opinion the Third District Court wrote:

> The State argues that appellant's petition is time-barred because more than two years have elapsed from the plea date. For this argument the State relies on Vonia v. State, 680 So. 2d 438 (Fla. 2d DCA 1996), cited by the Florida Supreme Court in the Wood decision. If the State's analysis were correct, then the Florida Supreme Court would have denied relief to Wood, who was attacking a plea entered ten years previously. The court held that Wood would be given the benefit of the newly-created two-year time window to file his claim. As we read Wood, appellant in this case receives benefit of the two-year time window and his claim is not time-barred.

The State reiterated that:

> 3. The crux of the State's argument is not that appellant's petition is time-barred because more than two years have

> elapsed from the plea date but rather that *the availability of Rule 3.850 relief renders coram nobis an improper remedy because the defendant had other relief available.*

CONCLUSION

In sum then, the State submits that under the principals of *Vonia*, the prior availability of Rule 3.850 relief while appellant was in custody renders coram nobis relief an improper remedy and accordingly the State respectfully urges this Court to reverse the order of the Third District Court of Appeal affirming the denial of Somintac's petition for a writ of error coram nobis on the basis of *Pert v. State*, 705 So. 2d 1059 (Fla. 3rd DCA 1998)..

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

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FREDERICKA SANDS
Assistant Attorney General
Florida Bar Number 0894620
Office of the Attorney General
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441

____

MICHAEL J. NEIMAND
Assistant Attorney General
Bureau Chief Criminal Appeals
Florida Bar Number 0239437
Office of the Attorney General
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441

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 30th day of March, 2000, to Arthur Joel Berger, Esq., attorney for the Petitioner, 9200 South Dadeland Boulevard, Suite 506, Miami, Florida 33156.

____
FREDERICKA SANDS
Assistant Attorney General

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APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

FREDERICKA SANDS
Assistant Attorney General
Florida Bar No. 0894620
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue,Suite 950
Miami, Florida 33131
Telephone: (305) 377-5441
Facsimile: (305) 377-5655

INDEX TO APPENDIX

DESCRIPTION

Exhibit A Opinion, *Somintac v. State*, 24 Fla. L. Weekly D2241 (Fla. 3rd DCA Sept. 29, 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 30th day of March, 2000 Arthur Joel Berger, Esq., attorney for the Petitioner, 9200 South Dadeland Boulevard, Suite 506, Miami, Florida 33156.

____
FREDERICKA SANDS
Assistant Attorney General