IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILLIAM DAN PERRY,

Respondent.

CASE NO. SC00-495

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, William Dan Perry, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The symbol "I" will refer to the one volume record on appeal. Each symbol will be followed by the appropriate page number in parentheses.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

On April 28, 1959, Perry was charged with grand larceny for stealing a motorcycle. (I.1). Perry plead guilty and was sentenced to five years of probation. (I.6). Perry's probation terminated on July 13, 1962. (I.8).

On November 9, 1998, Perry filed a petition for writ of error coram nobis. (I.9-28). In his petition, Perry claims that when he was 19 years old and an airman in the Air Force, he had been drinking with two other airman, and they decided to take a motorcycle for a joyride before heading back to Tyndall Air Force Base. (I.9). Perry claims that the men had no intent to

permanently keep the motorcycle because they could not have a motorcycle on the Air Force Base. (I.9). A law enforcement officer saw the men on the motorcycle, and arrested them taking them to jail. (I.10).

Perry states that he did not have money to hire counsel to represent him and because the crime occurred prior to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), counsel was not appointed to represent him. (I.10). On April 30, 1959, Perry was brought to the circuit court where the prosecutor informed him that if he pled guilty he would be released for jail but if he did not he would remain in jail and face trial without a lawyer to represent him. (I.10). Perry claims that he was given a copy of the information which led him to believe that "if he intentionally took the motorcycle without permission, he was guilty of grand larceny even though he and his friends were only 'joyriding' and intended to return the bike before heading back to their Base for the evening." (I.10). Perry entered a guilty plea and did not appeal his sentence of probation. (I.11). Perry claimed that the failure to inform him of the elements of the offense of grand larceny was a fact of a vital nature that had it been known to the trial court it would have prevented the entry of the judgment and sentence. (I.11).

The trial court denied Perry's petition for writ of coram nobis. (I.29-43). The trial court found Perry's allegations of coercion were questionable and in all likelihood based on the prosecutor's good-faith belief in the correctness of the charge and likelihood

of continued pre-trial incarceration. The trial court found that although Perry maintained that the trio would have returned the bike, the police and prosecutor had no way of knowing that because they had not returned the bike before they were arrested. Moreover, the court stated that "the prosecutor's alleged comments regarding Perry's continuing pre-trial incarceration were presumably made in good faith and not disingenuous." (I.33). The court found that Perry had not established a reasonable basis for a claim of coram nobis relief, and denied Perry's petition.

Perry appealed to the First District Court of Appeal. (I.46). The First District recognized that "[w]e are not dealing with facts unknown to the parties at the time of the plea or which could not have been discovered through the use of due diligence, but rather questions of law related to the voluntariness of the plea in light of known facts and the validity of the plea in light of appellant's known status as an unrepresented indigent defendant." Perry v. State, 25 Fla. L. Weekly D541, D542 (Fla. 1st DCA Feb. 28, 2000). The First District recognized conflict among the Second, Third, and Fourth District Courts of Appeal as to whether the voluntariness of a plea is subject to coram nobis review. The First District certified the following question of great public importance:

> WHETHER THE DECISION IN WOOD V. STATE, 24 FLA. L. WEEKLY S240 (FLA. MAY 27, 1999), AUTHORIZES THE USE OF CORAM NOBIS IN CIRCUMSTANCES WHERE THE ALLEGED ERROR TO BE CORRECTED CONCERNS WHETHER THE LAW WAS PROPERLY APPLIED TO FACTS WHICH WERE KNOWN, OR SHOULD HAVE BEEN KNOWN THROUGH THE EXERCISE OF DUE DILIGENCE, AT THE TIME THE ALLEGED ERROR OCCURRED?

Id.

SUMMARY OF ARGUMENT

ISSUE I.

Perry filed a petition for writ of error coram nobis claiming that his plea was involuntary. Perry is not entitled to relief because Perry has not established that an error of fact occurred which that was unknown at the time and if known to the trial court would have prevented the entry of the judgment. This Court's decision in Wood did not expand the limited scope of relief available under coram nobis. A petition of writ of coram nobis may only be used to correct an error of fact and not an error of law. The fact must be of such a vital nature that had it been known to the trial court it would have prevented the entry of judgement. A claim that a plea is involuntary because a defendant is unaware of the legal consequences of the plea is not a error of fact but instead an issue of law. Therefore, the First District's question of whether coram nobis is authorized in circumstances where the alleged error to be corrected concerns whether the law was properly applied to the facts which were known or should have been known at the time the error occurred, should be answered in the negative.

ARGUMENT

ISSUE I

> WHETHER THE DECISION IN WOOD V. STATE, 24 FLA. L. WEEKLY S240 (FLA. MAY 27, 1999), AUTHORIZES THE USE OF CORAM NOBIS IN CIRCUMSTANCES WHERE THE ALLEGED ERROR TO BE CORRECTED CONCERNS WHETHER THE LAW WAS PROPERLY APPLIED TO FACTS WHICH WERE KNOWN, OR SHOULD HAVE BEEN KNOWN THROUGH THE EXERCISE OF DUE DILIGENCE, AT THE TIME THE ALLEGED ERROR OCCURRED?

In 1959, Perry was charged and pled guilty to grand theft larceny for taking a motorcycle. Perry filed a petition for writ of error coram nobis claiming that his plea was involuntary because he was not represented by counsel, he did not understand that elements of the crime, specifically that he had to intend to permanently deprive the owner of the motorcycle, and the prosecutor coerced him into entering into the plea. Perry v. State, 25 Fla. L. Weekly D541, D542 (Fla. 1st DCA Feb. 28, 2000). The trial court found that Perry was not entitled to coram nobis relief, and the District Court of Appeal certified the following question:

> WHETHER THE DECISION IN WOOD V. STATE, 24 FLA. L. WEEKLY S240 (FLA. MAY 27, 1999), AUTHORIZES THE USE OF CORAM NOBIS IN CIRCUMSTANCES WHERE THE ALLEGED ERROR TO BE CORRECTED CONCERNS WHETHER THE LAW WAS PROPERLY APPLIED TO FACTS WHICH WERE KNOWN, OR SHOULD HAVE BEEN KNOWN THROUGH THE EXERCISE OF DUE DILIGENCE, AT THE TIME THE ALLEGED ERROR OCCURRED?

Perry, at D542.

This Court's decision in Wood v. State, does not authorize the use of coram nobis where the alleged error to be corrected concerns an issue of law which was known or should have been known through the exercise of due diligence. In Wood, this Court held that "all

defendants adjudicated prior to this opinion shall have two years from the filing date within which to file **claims traditionally cognizable under coram nobis**." Id. at S241 (emphasis added). Thus, Wood does not expand relief available under coram nobis, but instead, limits it to claims of relief which were traditionally available under coram nobis.

The common law writ of error coram nobis "is a discretionary writ and will not be employed if any other remedy exists." Ex parte Welles, 53 So.2d 708, 711 (Fla. 1951). Therefore, the petition can only be used "when it is necessary for the accursed to bring some new fact before the court which cannot be presented in any of the methods provided by statute, but it will not lie in cases covered by statutory provisions." Nickels v. State, 98 So. 502 (Fla. 1923). "The function of a writ of error coram nobis is to correct errors of fact, not errors of law." Hallman v. State, 371 So.2d 482, 485 (Fla. 1979). See Ex parte Welles, at 710("In our view the facts in this case bring it within the scope of the common law writ of error coram nobis, the primary purpose of which was to afford the trial court an opportunity to correct its own record with reference to vital facts not known to the court when the judgment was entered."). "The facts upon which the 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." Hallman at 485. "[T]he alleged facts must be of such a vital nature that had they been known to the trial court, they

conclusively would have prevented the entry of the judgment." Id.[1] The writ of error coram nobis is also "available to correct an error in the court's record caused by a default in the performance of duty by ministerial officers." Malcolm v. State, 605 So. 2d 945 (Fla. 3d DCA 1992). See Weir v. State, 319 So.2d 80 (Fla. 2d DCA 1975)(holding that coram nobis relief was available to defendants raising an issue pursuant to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), whose claims were not barred by latches).

This Court, in Wood, reinforced the narrow scope of relief available pursuant to a writ of error coram nobis, stating that:

> The requirements of a writ of error coram nobis have been set out in numerous cases from this Court. A petition for this writ addressed to the appellate court must disclose fully the alleged facts relied on; mere conclusory statements are insufficient. The appellate court must be afforded a full opportunity to evaluate the alleged facts for itself and to determine whether they establish prima facie grounds. **Furthermore, the petition should assert the evidence upon which the alleged facts can be proved and the source of such evidence. The function of a writ of error coram nobis is to correct errors of fact, not errors of law. The facts upon which the 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**.
>
> In considering a petition for writ of error coram nobis, the appellate court has the responsibility to determine the legal effect of the facts alleged upon the previously entered judgment. When the appellate court finds that the facts are sufficient in legal effect, the next step is for the trial court to determine the truth

[1] In Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), this Court stated that from "henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."

of the allegations in an appropriate evidentiary hearing.

> The general rule repeatedly employed by this Court to establish the sufficiency of an application for writ of error coram nobis is that **the alleged facts must be of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment.... This traditional "conclusiveness test" in error coram nobis proceedings is predicated on the need for finality in judicial proceedings.** This is a sound principle, for litigants and courts alike must be able to determine with certainty a time when a dispute has come to an end.

Wood, at S241, citing Hallman, at 484-85(emphasis added; footnote omitted). Therefore, Wood still limits coram nobis relief to errors of fact.

A claims that a plea is involuntary is a issue of law. There is a difference between a question of fact and an error of fact. A question of fact arises when two or more conclusions can be drawn from the facts. Loftin v. McGregor, 14 So. 2d 574 (Fla. 1943). The determination of the voluntariness of a plea may involve questions of fact, such as whether the defendant was advised of certain consequences. However, an error of fact is one which conclusively would have prevented the entry of judgment the judgment and sentence had it been known.

Perry claims that his plea was involuntary because he was not represented by counsel, he did not understand the elements of the crime, and was coerced by the prosecutor. These issues are **not** fundamental errors of fact, but instead are errors of law. In Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA 1998), rev. granted, 722 So.2d 193 (Fla.1998), the defendants claimed that there plea

was involuntary because the court had failed to warn them about the possibility of deportation. Id. at 1061. The court stated that "the defendants do 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 their plea colloquy rendering their pleas involuntary. Id. at 1062. Therefore, the court found that coram nobis relief was not an appropriate remedy." Id.

In State v. Garcia, 571 So. 2d 38 (Fla. 3d DCA 1990), Garcia, claimed that his guilty plea had not been knowingly and intelligently made because he was not aware of the consequences of his plea. The court also found that it was an error or law and not within the function of a writ of error coram nobis. Id. at 39.

Other districts have held that an involuntary plea is an issue of fact not an issue of law. In Knibbs v. State, 24 Fla. L. Weekly D2730 (Fla. 2d DCA December 10, 1999), the Second District held that Knibbs' claim that he was induced to plea guilty because of ignorance in that he was not advised by the court of the deportation consequences of his plea was a factual issue and a valid basis for coram nobis relief. In Gregersen v. State, 714 So. 2d 1195 (Fla. 4th DCA 1998), the Fourth District held that Gregersen's claim that her plea was involuntary because she was not advised of the consequences of deportation was a error of fact, not an error of law. Both of these cases base their holdings upon a misreading of Nickels v. State, 98 So. 502 (Fla. 1923).

Nickels pled guilty to the charge of rape and he was sentence to hang. Id. at 503. Nickels filed a petition for writ of coram nobis claiming that he "entered his guilty plea because he was afraid of being killed." Id. at 503-504. The trial court did **not** ask Nickels during the plea colloquy if the plea was tendered because of fear or duress. Id. at 503. The Court stated that:

> The functions of a writ of error coram nobis are limited to an error of fact, for which the statute provides no other remedy, which fact did not appear of record, or was unknown to the court when judgment was pronounced, and which, if known, would have prevented the judgment, and which was unknown, and could not have been known to the party by the exercise of reasonable diligence in time to have been otherwise presented to the court, unless he was prevented from so presenting them by duress, fear, or other sufficient cause.

Id. at 504. The Court further explained that "[t]he writ of error coram nobis is not intended to authorize any court to revise and review its opinions; **but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court.**" Id. at 504 (emphasis added). The Nickels court maintained that the writ "does not lie to correct any error in the judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself." Id. The Nickels court did find that "[a] plea of guilty, forced from an accused by a well-grounded fear of mob violence, will not sustain a judgment of conviction when properly attacked." Id. Therefore, the Court reversed and remanded for the trial court to consider Nickels' petition.

The trial court accepted the Nickels' plea unaware of the threats of mob violence and Nickels was prevented from revealing the threats to the court because of fear and duress, which was an issue of fact not an issue of law. Had the trial court been aware of the fact that Nickels had been forced to enter the guilty plea based on the fear of mob violence, the trial court could not have accepted Nickels' plea. The threat of mob violence is the "unknown fact" the allows for coram nobis relief. Accordingly, Nickels does **not** hold a defendant's claim that his plea was involuntary because a he was unaware of the legal consequences of entering the plea is a ground for coram nobis relief. Rather, Nickels held that because certain facts were unknown to the court and if known to the court would have prevented the entry of the judgment and sentence, Nickels was entitled to coram nobis relief. Knibbs and Gregersen misapplied Nickels because the fact that a defendant may be deported upon entry of a plea would not produce an acquittal or prevent the entry of judgement. Therefore, Knibbs and Gregersen were wrongly decided.

In the case at bar, there are no grounds to establish a claim for coram nobis relief. Perry claims that the prosecutor brought him to court and informed him that if he pled guilty he would be released but if he did not plea would remain in jail to await trial and he would not have a lawyer to represent him. (I.10). The prosecutor's statement appears to be true, and if known to the trial court would not have prevented the entry of the judgment. Perry also claims that he was given a copy of the information which

led him to believe that if he intentionally took the motorcycle without permission he was guilty of grand larceny even though he was only joyriding and intended to return the motorcycle. (I.10). Perry asserts that the failure to inform him of the elements of the offense would have prevented the entry of the judgment and sentence. Once again Perry is incorrect. The fact that Perry claimed that he intended to return the motorcycle would not have prevented the entry of the judgment for his conviction for grand larceny. There was sufficient evidence for a jury to concluded that Perry did intend to permanently deprive the owner of his motorcycle. The law enforcement officer saw the men on the motorcycle and arrested them. Perry had not yet returned the bike to the rightful owner, and a jury could concluded that Perry was not going to return the bike. Thus, Perry offers no facts which would have prevented the entry of the judgement, and is not entitled to coram nobis relief.

In summary, this Court's decision in Wood did not expand the limited scope of relief available under coram nobis. A petition of writ of coram nobis may only be used to correct an error of fact and not an error of law. The fact must be of such a vital nature that had it been known to the trial court it would have prevented the entry of judgement. A claim that a plea is involuntary because a defendant is unaware of the legal consequences of the plea is not a error of fact but instead a issue of law. Therefore, the First District's question of whether coram nobis is authorized in circumstances where the alleged error to be corrected concerns

whether the law was properly applied to the facts which were known or should have been known at the time the error occurred, should be answered in the negative.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 25 Fla. L. Weekly D541 should be disapproved, and the order entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to **Kelly McIntosh Sale**, Esq. Daniel & Komarek, 315 East Fourth Street, Panama City, Florida 32402, and **Douglas E. Kingsbery**, Tharrington Smith, L.L.P., 209 Fayetteville Street Mall, Raleigh, North Carolina 27601, this ____ day of April, 2000.

_____
Trisha E. Meggs
Attorney for the State of Florida

[C:\Supreme Court\04-19-01\00-495ini.wpd --- 4/19/01,1:01 pm]

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. WILLIAM DAN PERRY, Respondent.	CASE NO. SC00-495

APPENDIX

Perry v. State, 25 Fla. L. Weekly D541 (Fla. 1st DCA February 28, 2000).