IN THE SUPREME COURT OF FLORIDA

GERALD LYNN BATES,

Petitioner,

v.

CASE NO. SC02-1481

1D01-1149

STATE OF FLORIDA,

Respondent.

________________________/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLA. BAR NO. 197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

GERALD LYNN BATES,	:	
	:	
Petitioner,	:	
	:	
v.	:	CASE NO. SC02-1481
	:	1D01-1149
STATE OF FLORIDA,	:	
	:	
Respondent.	:	
______________________________	:	

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses.

Attached hereto as appendix A is the opinion of the lower tribunal, which has been reported as Bates v. State, 818 So. 2d 626 (Fla. 1st DCA 2002). Appendix B is a copy of the judgment and sentence and habitual offender order imposing the sentences which petitioner is currently serving. This brief is also being submitted on a disk in WordPerfect format.

This same issue is presently before this Court in Woods v. State, 806 So. 2d 621 (Fla. 3rd DCA) *review granted*, case no. SC02-484 (Fla. Feb. 26, 2002).

II STATEMENT OF THE CASE AND FACTS

The issue before the lower tribunal was whether petitioner had set forth a claim for relief where he alleged that his counsel had misadvised him as to the ramifications of his 1990 plea to possession of cocaine, which was later used as a predicate offense to impose an habitual offender sentence.[1] The procedural history is set forth in the lower tribunal's opinion:

> On September 7, 1999, Appellant filed a Petition for Writ of Error Coram Nobis, seeking to have his 1990 conviction vacated. The trial court construed the petition as a Motion for Post-conviction Relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Appellant alleged that he entered a plea of guilty to one count of constructive possession of cocaine on January 23, 1990, and was sentenced to 69 days in jail, with credit for 69 days served, to be followed by 12 months' probation, with early termination upon payment of court costs. His probation was terminated on February 7, 1991. He was subsequently convicted of an undisclosed felony in 1994, and his 1990 conviction and sentence was used as a predicate offense to habitualize him. In his motion, Appellant

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[1]Although the nature of petitioner's present sentences is not disclosed in the record, the Department of Corrections' website shows that he is serving life sentences for armed burglary and armed robbery and a 10 year sentence for aggravated assault. http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=1&From=list&SessionID=208651233. Documents attached as appendix B show that he was sentenced as an habitual offender.

> alleged as his first ground for relief that his trial counsel misadvised him on the future sentencing-enhancing consequences of his plea. He contended that upon questioning his counsel about the ramifications of his plea, his counsel assured him that his offense could never be used against him and that convictions for possession of controlled substances were excluded from use as a prior offense in the habitual offender statutes. He further alleged that he would not have entered a plea but would have proceeded to trial had he been advised of the possible future sentence-enhancing consequences of his plea.

Appendix A at 2. The majority of the First District held that petitioner was entitled to no relief:

> We conclude that the Appellant was not entitled to an evidentiary hearing on the voluntariness of his plea where his plea was entered on the alleged misadvice of his defense counsel as to the potential for enhanced penalties for Appellant's future criminal behavior. *See Scott v. State,* 27 Fla. L. Weekly D817, D818 (Fla. 3d DCA Apr. 19, 2002) (holding that a "defendant is not entitled to relief where he has been given affirmative misadvice regarding the possible sentence-enhancing consequences of a plea in the event that the defendant commits a new crime in the future"). Accordingly, although we find the trial court's reasoning for summary denial to be erroneous, we affirm the trial court's ultimate decision to deny relief on Appellant's affirmative misadvice claim.

Appendix A at 4; footnote 5 omitted.

The majority noted that this Court had recently decided a

similar question in Major v. State, 814 So. 2d 424 (Fla. 2002), and certified the following question:

> WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCE-ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA FOR FUTURE CRIMINAL BEHAVIOR IN AN OTHERWISE FACIALLY SUFFICIENT MOTION ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Appendix A at 4.

Chief Judge Allen, dissenting, expressed the view that petitioner had stated a claim for relief, on authority of State v. Ginebra, 511 So. 2d 960 (Fla. 1987), and State v. Leroux, 689 So. 2d 235 (Fla. 1996):

> I would, however, reverse the trial court's summary denial of the appellant's claim that he is entitled to withdraw his plea because the plea would not have been entered and he would have proceeded to trial except for his trial counsel's positive misadvice that his conviction could not be used to enhance future sentences. I would do so because the motion contains the necessary allegations to state a claim for relief and the trial court has not attached portions of the record conclusively refuting those allegations.
>
> In *State v. Ginebra,* 511 So.2d 960 (Fla. 1987), the supreme court held that a defense attorney must advise a defendant of only the direct consequences of his plea as enumerated in Florida Rule of Criminal Procedure 3.172© in order to provide effective assistance of counsel in conjunction with this aspect of the

> representation. The court left open the issue of whether "positive misadvice" as to a collateral consequence of a plea might amount to ineffective assistance. *Id.* at 962 n.6. But subsequent decisional law makes it clear that where such misadvice leads a defendant to enter a plea he otherwise would not have entered, both the performance and prejudice prongs of *Strickland* are satisfied and the plea may be withdrawn. *See, e.g., State v. Leroux,* 689 So.2d 235 (Fla. 1997); *State v. Sallato,* 519 So.2d 605 (Fla. 1988); *Romero v. State,* 729 So.2d 502 (Fla. 1st DCA 1999); *Burnham v. State,* 702 So.2d 303 (Fla. 1st DCA 1997). These post-*Ginebra* decisions are fully consistent with federal precedent. *See, e.g., Hill v. Lockhart,* 474 U.S. 52 (1985).

Appendix A at 5.

By unreported order issued along with the opinion, the lower tribunal appointed this Office to represent petitioner in this Court. Petitioner filed a timely notice of discretionary review, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v), and Art. V, §3(b)(3), Fla. Const.

III SUMMARY OF THE ARGUMENT

The majority opinion in this case held that where a defendant claims that his attorney gave him affirmative misadvice that his plea could not be used to later enhance future sentences, the defendant has not set forth an actionable claim of ineffective assistance of counsel.

The standard of review is de novo, since this case involves only a question of law.

The majority opinion is incorrect. The law is clear that where an attorney offers affirmative misadvice on some collateral matter (such as possible deportation or involuntary civil commitment as a sex offender or eligibility for gain time or registration as a sex offender or certification as a correctional officer), and the defendant relies on that misadvice in deciding whether to enter a plea, the defendant has set forth a claim of ineffective assistance of counsel and is entitled to a hearing on his request to withdraw his plea.

There is no reason why the result should not be the same where the attorney misadvises the defendant that his plea cannot be used to enhance a future sentence. The Second and Fourth Districts have agreed with petitioner's position and held that a defendant who alleges that his attorney affirmatively misadvised him that a plea to a crime could

never be used to enhance a future sentence has set forth a claim for postconviction relief. The Third District has held to the contrary.

This Court must accept the Second and Fourth Districts' view and hold that where a defendant alleges that his attorney's affirmative misadvice that a plea cannot be used to enhance a future sentence caused him to enter the plea, he is entitled to relief.

This Court must answer the certified question in the affirmative and hold that petitioner has stated a valid claim for relief.

IV ARGUMENT

ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCE-ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA FOR FUTURE CRIMINAL BEHAVIOR IN AN OTHERWISE FACIALLY SUFFICIENT MOTION ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The issue before the lower tribunal was whether petitioner had set forth a claim for relief where he alleged that his counsel had misadvised him as to the ramifications of his 1990 plea to possession of cocaine, which was used in 1994 as a predicate offense to impose an habitual offender life sentence.[2]

The majority of the First District in this case held that petitioner had not set forth an actionable claim of ineffective assistance of counsel. The majority opinion is incorrect. The law from this Court is clear that where an attorney offers affirmative misadvice, and the defendant relies on that misadvice in deciding whether to enter a plea, then the defendant has set forth a claim of ineffective assistance of counsel and is entitled to withdraw his plea.

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[2]*See* Appendix B at 12, where it shows that this crime and a worthless check conviction from 1993 were used as the two predicate offenses.

The dissent properly set forth the prevailing law.[3]

The standard of review in this case is de novo, since this case involves only a question of law. City of Jacksonville v. Cook, 765 So. 2d 289 (Fla. 1st DCA 2000).

In Major v. State, 814 So. 2d 424 (Fla. 2002), this Court held that defense counsel has no duty to inform his or her client that if the client enters a plea in the pending, that conviction may cause a sentence for a future crime to be enhanced, because the possibility of future enhancement was a collateral, not direct, consequence of the plea. Major left open the question presented here -- where the lawyer gives affirmative misadvice that the plea cannot be used to enhance a future sentence, is the defendant entitled to relief.

In State v. Ginebra, 511 So. 2d 960 (Fla. 1987), this Court held that a defendant who is not a U.S. citizen cannot collaterally attack his plea on the grounds that his lawyer failed to advise him that his plea could lead to deportation. State v. Ginebra also left open the question presented here.

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[3]The lower tribunal neglected to discuss its contradictory decision in *Joyner v. State*, 795 So. 2d 267, 268 (Fla. 1st DCA 2001), in which it held that defense counsel's affirmative misadvice that a youthful offender adjudication did not count as a prior conviction "for future repercussions" set forth a valid claim for relief.

Id at 962, note 6.[4] But in State v. Sallato, 519 So. 2d 605 (Fla. 1988), this Court indicated that affirmative misadvice about the effect of a plea on possible deportation may set forth a claim for relief.

Ten years later, in State v. Leroux, 689 So. 2d 235, 236 (Fla. 1997), this Court set forth the general rule regarding the effect of affirmative misadvice from a defense lawyer which leads a defendant to enter a plea:

> Misrepresentations by counsel as to the length of a sentence or eligibility for gain time can be the basis for postconviction relief in the form of leave to withdraw a guilty plea.

The same rule should apply where a lawyer affirmatively misadvises a client that his plea can never be used to enhance a sentence for a future crime. Such affirmative misadvice goes to the heart of the voluntariness of the plea, just like affirmative misadvice regarding the amount of time the defendant will have to serve in prison if he enters a plea.[5]

While it is true that the district courts of appeal are

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[4] *State v. Ginebra* was also superceded by Fla. R. Crim. P. 3.172(c)(8). *See State v. DeAbreu*, 613 So. 2d 453 (Fla. 1993).

[5] The lower tribunal has recognized that the latter would set forth a claim for relief. *See Romero v. State*, 729 So. 2d 502 (Fla. 1st DCA 1999); and *Burnham v. State*, 702 So. 2d 303 (Fla. 1st DCA 1997).

split on the precise issue presented here, the Fourth District's position supports petitioner's claim for relief. In LaMonica v. State, 732 So. 2d 1175 (Fla. 4th DCA 1999), the defendant's postconviction motion alleged that his attorney erroneously informed him that if he entered a plea to a sex crime, he would not be subject to the mandatory reporting requirements for sex offenders who are released from custody. The court held that although the reporting requirement was a collateral consequence of the plea, the defendant was entitled to a hearing on his motion because he had claimed that his attorney had given him "affirmative misinformation." *Id.* at 1176.

In Smith v. State, 784 So. 2d 460 (Fla. 4th DCA 2000), the defendant entered a plea in 1994 to aggravated battery and three misdemeanors in exchange for a sentence of time served. The aggravated battery conviction was later used to declare him to be an habitual violent offender on a subsequent crime.

Mr. Smith filed a motion for postconviction relief and alleged that his attorney on the 1994 aggravated battery had told him that crime could never be used as a prior conviction in state or federal court. He further alleged that he would not have entered a plea if he had known that the aggravated battery could be used to enhance a sentence for a subsequent

crime. The Fourth District held that his allegations had set forth a claim for relief. *Accord*: Jones v. State, 814 So. 2d 446 (Fla. 4th DCA 2001).

In Roberson v. State, 792 So. 2d 585 (Fla. 4th DCA 2001), the defendant's postconviction motion alleged that his attorney had misinformed him that he was entering a plea to a misdemeanor when in fact the crime was a felony. The court remanded for a hearing on this claim.

In Love v. State, 814 So. 2d 475 (Fla. 4th DCA 2002), the defendant entered a plea in 1987 in state court to attempted trafficking in cocaine. In 1995, he was sentenced in federal court for a new crime, and the 1987 conviction was used to enhance his federal sentence.

Mr. Love filed postconviction motions alleging that his attorney on the 1987 Florida crime affirmatively misadvised him that a plea of nolo contendere was not the same as a plea of guilty, and that a nolo plea could not be used against him in any future proceedings. He also alleged that he would not have entered his plea to the 1987 Florida crime if he had known the full consequences of his plea.

The Fourth District held that Mr. Love's allegation of affirmative misadvice from his counsel had set forth a claim for relief. *Accord*: Murphy v. State, 27 Fla. L. Weekly D1156

(Fla. 4th DCA May 15, 2002): "affirmative misadvice, regarding even collateral consequences of a plea, may form the basis for withdrawing the plea."

In Ghanavati v. State, 27 Fla. L. Weekly D1380 (Fla. 4th DCA June 12, 2002), another deportation case, the defendant's motion for postconviction relief included an affidavit from his lawyer saying that the lawyer had advised him that his plea with adjudication withheld would cause him no "further repercussions at all arising from or relating to the charges or the plea itself." The defendant also swore in an affidavit that he would not have entered the plea if he had known of the deportation consequences. The Fourth District reversed for a hearing and summed up its position in such cases:

> When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her.

Cases from the Second District would support petitioner's position. In Ray v. State, 480 So. 2d 228 (Fla. 2nd DCA 1985), the defendant entered a plea to armed robbery with a firearm after his attorney erroneously informed him that he would receive gain time against the three year mandatory minimum sentence. He filed a motion for postconviction relief and

alleged that his plea was involuntary because of the attorney's misadvice. The court held that Mr. Ray had set forth a valid claim for relief:

> We recognize that a defendant may not always be entitled to withdraw a plea of guilty because his sentence is not what his lawyer led him to expect. *Lepper v. State*, 451 So.2d 1020 (Fla. 1st DCA 1984). However, **we perceive a difference between a "judgment call," whereby an attorney offers an honest but incorrect estimate of what sentence a judge may impose, and a clear misstatement of how the law affects a defendant's sentence. A criminal defendant is entitled to reasonable reliance upon the representations of his counsel and, if he is misled by counsel as to the consequences of a plea, he should be permitted to withdraw that plea**. *Trenary v. State,* 453 So.2d 1132 (Fla. 2d DCA 1984). In the instant case we are unable to state as a matter of law that ineffectiveness of counsel did not occur if Ray's allegations are true.

Id. at 229; emphasis added. The same is true in the instant case. Petitioner received from his attorney "a clear misstatement" of the law regarding the use of his plea in subsequent proceedings.

Likewise, in Roberti v. State, 782 So. 2d 919 (Fla. 2nd DCA 2001), the defendant entered a plea to three sex crimes in exchange for a negotiated split sentence of 17 years in prison followed by 10 years probation. He alleged that his counsel told him that he would not be subject to involuntary civil

commitment under the Jimmy Ryce Act, because his probation was to be served out of state, which was not the law. The court held that although such a commitment was a collateral consequence of the plea, Mr. Roberti had set forth a valid claim for relief because he alleged that his attorney gave him affirmative misadvice.[6]

In Walkup v. State, 27 Fla. L. Weekly D1626 (Fla. 2nd DCA July 17, 2002), the defendant entered a negotiated plea to the lesser charge of attempted capital sexual battery. He later alleged that his counsel had told him if he did not enter a plea, he would be subject to Jimmy Ryce commitment. The court cited Roberti and reversed for an evidentiary hearing at which Mr. Walkup would have to prove that his attorney's misadvice had caused him to enter the plea.

The Third District has taken a position contrary to the Second and Fourth Districts. In a line of cases commencing with Rhodes v. State, 701 So. 2d 388 (Fla. 3rd DCA 1997) (including Woods v. State, *supra*; Ford v. State, 753 So. 2d 595 (Fla. 3rd DCA 2000); Scott v. State, 813 So. 2d 1025 (Fla.

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[6]In *Bethune v. State*, 774 So. 2d 4 (Fla. 2nd DCA 2000), the Second District held, consistent with *Major, supra*, that the defendant need not be advised of the collateral consequence of his plea that he may be subject to habitual offender sanctions in the future. But *Bethune* was not an affirmative misadvice case.

3rd DCA 2002); and Cifuentes v. State, 816 So. 2d 804 (Fla. 3rd DCA 2002)) and concluding with McPhee v. State, 27 Fla. L. Weekly D1521 (Fla. 3rd DCA June 26, 2002), that court has held that even if an attorney gives his client affirmative misadvice about the collateral consequences of the plea, that fact does not set forth a valid claim for postconviction relief.[7]

The Third District's position on the issue presented here is founded on its finding in Rhodes v. State, *supra*, that to warn a defendant that his present crime could be used to enhance a sentence on a future crime is an encouragement to the defendant to commit future crimes. That reasoning makes no sense.[8] If a defendant heeds such a warning, he will not want to commit future crimes. Actually, the failure to warn is what encourages recidivism.

Thus, this is the current state of the case law in Florida regarding affirmative misadvice by defense counsel as

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[7] *But see State v. Johnson,* 615 So. 2d 179 (Fla. 3rd DCA 1993) (affirmative misadvice that a plea to a crime with adjudication withheld would not affect the defendant's status as a certified correctional officer set forth valid claim for relief).

[8] Chief Judge Allen also had "some difficulty in following this logic." Appendix A at 5. In any event, this Court held in *Major* that there is no duty to warn, so whether the failure to warn encourages recidivism or not is irrelevant.

to the collateral consequences of a plea:

÷ if a lawyer tells his client that a youthful offender conviction cannot be used to habitualize, the client is entitled to relief (Joyner v. State, *supra*);

÷ if a lawyer tells his foreign client that his plea will not cause him to be deported, the client may be entitled to relief (State v. Sallato and Ghanavati v. State, *supra*);

÷ if a lawyer misleads his client about the amount of time he will have to serve in prison or the amount of gain time he will receive, the client is entitled to relief (State v. Leroux, Burnham v. State, Romero v. State and Ray v. State, *supra*);

÷ if a lawyer tells his client that a plea to a sex offense will not require him to register as a sex offender, the client is entitled to a hearing on this claim (Lamonica v. State, *supra*);

÷ if a lawyer tells his client that his conviction cannot be used to enhance a later sentence in state or federal court, the client is entitled to relief (Smith v. State and Love v. State, *supra*);

÷ if a lawyer tells his client that a plea to a sex offense will not expose him to involuntary civil commitment under the Jimmy Ryce Act, the client is entitled to a hearing

on this claim (<u>Roberti v. State</u>, and <u>Walkup v. State</u>, *supra*);

÷ and if a lawyer tells his correctional officer client that a plea with adjudication withheld will not cause him to lose his job, the client is entitled to a hearing on this claim (<u>State v. Johnson</u>, *supra*).

The above cases hold that where a defendant alleges that his attorney's affirmative misadvice on come collateral consequence of the plea caused him to enter the plea, he is entitled to relief. There is no reason why the result should not be the same in the instant case. The Fourth District's view on the issue presented here is consistent with the above cases as it pertains to misadvising a defendant about the use of his plea to enhance future sentences. The contrary view of the First and Third Districts is illogical and not consistent with the above cases.

This Court must accept the Fourth District's view and hold that where a defendant alleges that his attorney's affirmative misadvice that a plea cannot be used to enhance a future sentence caused him to enter the plea, he is entitled to relief. This Court must answer the certified question in the affirmative and hold that petitioner has stated a valid claim for relief.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court to hold that petitioner has set forth a claim of relief since his attorney affirmatively gave him misadvice regarding the ramifications of his 1990 plea to possession of cocaine.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

____
P. DOUGLAS BRINKMEYER
Fla. Bar no. 197890
Assistant Public Defender
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Trisha E. Meggs, Assistant Attorney General, The Capitol, Tallahassee, Florida; and to petitioner, #295638, Apalachee CI East, 35 Apalachee Drive, Sneads, Florida 32460; on this ___ day of August, 2002.

____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New

12 point type.

____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

GERALD LYNN BATES,

Petitioner,

v. CASE NO. SC02-1481

1D01-1149

STATE OF FLORIDA,

Respondent.

_______________________/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

APPENDIX A: Opinion of Lower Tribunal.

APPENDIX B: Judgment and Sentence of Gerald Bates as an Habitual Felony Offender.

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLA. BAR NO. 197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301

(904) 488-2458

ATTORNEY FOR PETITIONER

818 So.2d 626
27 Fla. L. Weekly D1464
(Cite as: 818 So.2d 626)
<KeyCite Citations>

District Court of Appeal of Florida,
First District.

Gerald Lynn BATES, Appellant,
v.
STATE of Florida, Appellee.

No. 1D01-1149.

June 6, 2002.

Following entry of guilty plea to one count of constructive possession of cocaine, defendant, seeking vacation of his conviction, filed petition for writ of error coram nobis. The Circuit Court, Duval County, Jean M. Johnson, J., construed the petition as a motion for postconviction relief, and denied the motion. Defendant appealed. The District Court of Appeal, Lewis, J., held that: (1) defendant's claim that his trial attorney had been ineffective in failing to file a motion to suppress was not cognizable in coram nobis, and (2) defendant's guilty plea was not rendered involuntary merely by virtue of the fact that his attorney had misadvised him that the ensuing conviction would never be used for sentence enhancement in future prosecutions.

Affirmed; question certified.

Allen, C.J., filed separate written opinion concurring in part and dissenting in part.

West Headnotes

[1] Criminal Law k1431
110k1431

Defendant's claim that his trial attorney had been ineffective in failing to move to suppress evidence with which the state had obtained his conviction for constructive possession of cocaine was not cognizable in coram nobis, and thus defendant's petition for writ of error coram nobis, seeking vacation of his cocaine conviction, could not be granted on such grounds; defendant himself was aware, upon entering his guilty plea to the cocaine possession charge, of facts which allegedly necessitated the filing of the suppression motion. U.S.C.A. Const.Amend. 6; West's F.S.A. RCrP Rule 3.850.

[2] Criminal Law k1412
110k1412

[2] Criminal Law k1431
110k1431

The function of writs 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.

[3] Criminal Law k1586
110k1586

Defendant's petition for writ of error coram nobis, wherein he was seeking vacation of his conviction of constructive possession of cocaine on grounds that he had been affirmatively misinformed by trial counsel that the conviction would never be used for habitualization in future criminal prosecutions, was timely filed, where the motion was filed within the available two-year window for postconviction motions for relief from judgment. West's F.S.A. RCrP Rule 3.850.

[4] Criminal Law k1482
110k1482

Defendant's guilty plea to constructive possession of cocaine was not rendered involuntary merely by virtue of the fact that his attorney had misadvised him that the conviction would never be used for sentence enhancement in future criminal prosecutions, and thus defendant was not entitled to vacation of the conviction on motion for postconviction relief; defense counsel was required to inform defendant only of the direct consequences of his guilty plea, which did not include the collateral consequence of

possible sentence enhancement in future criminal prosecutions. West's F.S.A. RCrP Rules 3.172, 1.850.

[5] Criminal Law k273.1(4)
110k273.1(4)

For defendant's guilty plea to be valid, neither the trial court nor trial counsel must advise him of the possibility that his sentence could be enhanced in future criminal prosecutions merely by virtue of the plea; trial counsel need only advise defendant of the direct consequences of his plea. West's F.S.A. RCrP Rule 3.172.

[6] Criminal Law k274(7)
110k274(7)

[6] Sentencing and Punishment k1203
350Hk1203

The purpose of sentence enhancement statutes is to punish and deter recidivism; allowing defendant to withdraw his guilty plea based on the affirmative misadvice of counsel concerning future sentence-enhancing consequences of the plea would frustrate this purpose.

***627** Gerald Lynn Bates, pro se, for Appellant.

Robert A. Butterworth, Attorney General, and Trisha E. Meggs, Assistant Attorney General, Tallahassee, for Appellee.

LEWIS, J.

Gerald Lynn Bates (Appellant) appeals the order summarily denying his motion for post-conviction relief filed pursuant to *Wood v. State,* 750 So.2d 592 (Fla.1999) (providing that all defendants previously adjudicated would have two years from issuance date of May 27, 1999, in which to file rule 3.850 motions raising claims traditionally cognizable under coram nobis). In his motion, Appellant alleged that he was entitled to withdraw his plea pursuant to *Wood* because his trial counsel affirmatively misinformed him of the future sentence-enhancing consequences of his plea and because his trial counsel was ineffective by failing to file a motion to suppress. We affirm on the motion to suppress claim. We also affirm on the affirmative misadvice claim but certify a question of great public importance.

On September 7, 1999, Appellant filed a Petition for Writ of Error Coram Nobis, seeking to have his 1990 conviction vacated. The trial court construed the petition as a Motion for Post-conviction Relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Appellant alleged that he entered a plea of guilty to one count of constructive possession of cocaine on January 23, 1990, and was sentenced to 69 days in jail, with credit for 69 days served, to be followed by 12 months' probation, with early termination upon payment of court costs. His probation was terminated on February 7, 1991. He was subsequently convicted of an undisclosed felony in 1994, ***628** and his 1990 conviction and sentence was used as a predicate offense to habitualize him. In his motion, Appellant alleged as his first ground for relief that his trial counsel misadvised him on the future sentencing-enhancing consequences of his plea. He contended that upon questioning his counsel about the ramifications of his plea, his counsel assured him that his offense could never be used against him and that convictions for possession of controlled substances were excluded from use as a prior offense in the habitual offender statutes. He further alleged that he would not have entered a plea but would have proceeded to trial had he been advised of the possible future sentence-enhancing consequences of his plea. As his second ground for relief, Appellant alleged that his trial counsel failed to file a motion to suppress as requested by Appellant. Appellant further alleged that had the motion to suppress been filed, he would have prevailed on the motion, and had he prevailed on the motion, he would have ultimately prevailed in the case.

The trial court found that the motion was untimely under *Wood* and summarily denied Appellant's motion. The trial court concluded that Appellant had failed to demonstrate that the facts upon which his motion was based were unknown to the trial court, counsel or himself or that these facts could not have been known by them through due diligence. The trial court further found that the failure of trial counsel to file a suppression motion was not a claim "traditionally cognizable in coram nobis" and that Appellant's claim of ineffective assistance of counsel for failure to file a motion to suppress was precluded based on Appellant's guilty plea.

[1][2] We agree with the trial court that Appellant's claim of ineffective assistance of counsel for failing to file a motion to suppress was not a claim traditionally cognizable in coram nobis, and thus, Appellant is not entitled to the two-year window in *Wood.* As stated in *Hallman v. State,* 371 So.2d 482 (Fla.1979) [FN1], and reiterated in *Wood:*

> FN1. *Hallman* has been abrogated on other grounds. *See Jones v. State,* 591 So.2d 911

(Fla.1991)(holding that newly discovered evidence must be such that it would probably, rather than conclusively, produce an acquittal at trial).

> 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.

371 So.2d at 485 (citations omitted). The due diligence requirement associated with petitions for writ of error coram nobis applies in the context of rule 3.850 motions brought under *Wood. See Wood,* 750 So.2d at 595. Thus, a petition for writ of error coram nobis cannot involve facts which were or should have been known at the time of the error. In the case at bar, Appellant affirmatively stated in his petition for relief that he knew, at the time of his plea, of the facts which gave rise to filing a motion to suppress. Therefore, because Appellant knew at the time of his plea the facts giving rise to this claim, Appellant's claim is not cognizable in coram nobis. Accordingly, we affirm the trial court's denial of Appellant's claim relating to his counsel's failure to file a motion to suppress.

[3] However, the trial court erred in finding that Appellant's claim of affirmative misadvice was untimely under *Wood. Wood* provided that all defendants previously adjudicated would have two years ***629** from May 27, 1999, in which to file rule 3.850 motions raising claims traditionally cognizable under coram nobis. Here, Appellant was not in custody on the conviction he now challenges when he learned that counsel misadvised him, and so relief was unavailable to him under rule 3.850 as it contained a requirement, until *Wood,* that the movant be in custody. In fact, Appellant was never in custody for two years under his initial conviction and his motion filed on September 7, 1999, was filed within the two-year filing window under *Wood.* More importantly, the facts giving rise to Appellant's misadvice claim were unknown at the time he entered his plea. Therefore, Appellant's claim was timely under *Wood.* [FN2] Thus, we disagree with the trial court's rationale in summarily denying Appellant's claim of misadvise.

> FN2. Although we find the petition timely under *Wood,* we specifically do not reach any issue not decided by the trial court, including the issue of laches. *Wood* does not foreclose a laches defense that Appellant discovered counsel's misadvice and could have sought relief at a much earlier time. *See Bartz v. State,* 740 So.2d 1243 (Fla. 3d DCA 1999). That issue would be subject to an evidentiary hearing.

[4][5] Although we disagree with the trial court's rationale in summarily denying Appellant's claim of misadvice, we affirm the trial court's ultimate decision to deny relief on Appellant's claim of misadvice on the future sentence-enhancing consequences of his plea. We note that this Court has long held that neither the trial court nor trial counsel must advise a defendant of possible subsequent enhancement for a plea to be valid. *See Rosemond v. State,* 433 So.2d 635 (Fla. 1st DCA 1983). Moreover, trial counsel need only advise Appellant of the direct consequences of his plea. *See* Fla. R.Crim. P. 3.172. [FN3] In affirming on this issue, we follow the Third District Court of Appeal's reasoning in *Rhodes v. State,* 701 So.2d 388 (Fla. 3d DCA 1997), which contains facts similar to the instant case. In *Rhodes,* the appellant claimed that he entered a guilty plea based on his counsel's misadvice that his drug possession conviction could not be used to enhance any future federal or state sentence. *Id.* at 388. The Third District held that Rhodes was not entitled to an evidentiary hearing on his affirmative misadvice claim because to do so would encourage recidivism. *Id.* at 389. [FN4]

> FN3. *See State v. Ginebra,* 511 So.2d 960, 962(Fla.1987) (holding that an attorney is required to advise a defendant of the direct consequences of a plea and will not be found ineffective for failing to advise of collateral consequences of the plea), *superseded by rule on other grounds as stated in State v. De Abreu,* 613 So.2d 453 (Fla.1993); *Sherwood v. State,* 743 So.2d 1196 (Fla. 4th DCA 1999)(on rehearing).

> FN4. *Rhodes* also pointed out that both Florida and federal courts have distinguished attempts to vacate pleas based on affirmative misadvice from those alleging failure to advise, but none of those "affirmative misadvice" cases, such as *State v. Sallato,* 519 So.2d 605 (Fla.1988)(involving the issue of whether a defendant may withdraw a plea based on allegations of counsel's "positive misadvice" regarding defendant's chances of becoming a United States citizen), involve misadvice as to the potential for enhanced penalties for future criminal behavior, as alleged in the instant

case. *See Rhodes,* 701 So.2d at 388.

[6] Future possible sentence-enhancement is a collateral consequence, not a direct consequence. As stated in *Rhodes,* warning of future possible sentence enhancement is too attenuated at the time of the initial sentencing. To allow a defendant to withdraw his plea under such circumstances could also be viewed as inviting a defendant's recidivism: "don't plead guilty, if you're planning on committing future crimes, because your conviction of ***630** this offense might be used to increase your punishment for future offenses." *Lewis v. United States,* 902 F.2d 576, 577 (7th Cir.1990). Such a warning would be premature as the defendant may or may not commit any future offenses, and counsel can not accurately predict a defendant's criminal proclivities and warn them of each possible future consequence of a plea. Furthermore, the purpose of enhancement statutes is to punish and deter recidivism. *See United States v. Mejias,* 47 F.3d 401, 404 (11th Cir.1995). To allow Bates to withdraw his plea based on affirmative misadvice of counsel concerning future sentence-enhancing consequences of his plea would frustrate this purpose.

The dissent relies on *State v. Leroux,* 689 So.2d 235 (Fla.1996), and the line of cases following it, to suggest that Appellant should be entitled to an evidentiary hearing on his claim to withdraw his plea. However, the present case can be distinguished from *Leroux.* In *Leroux,* the defendant filed a rule 3.850 motion alleging that his trial counsel's advice as to the estimated time of his release based on entitlement to gain time credits constituted ineffective assistance of counsel. The supreme court reiterated that the courts have long held that "a defendant may be entitled to withdraw a plea entered in reliance upon his attorney's mistaken advice about sentencing." *Id.* at 237. Thus, the supreme court held that Leroux was entitled to an evidentiary hearing unless the record conclusively refuted the defendant's allegations. *Id.*

Leroux focused on misadvice by counsel concerning the original sentencing. That is, the consequences of the plea complained of in *Leroux* were known quantities (or could have been discovered) at the time of the sentencing. Here, Bates' future criminal activity was unknown (or could not have been known with absolute certainty). Enhancement depended on whether Bates decided to commit another crime in the *future;* it is a contingency that may or may not occur. *Leroux* and the line of cases following *Leroux* deal with effects of the plea that are certain at the time of sentencing. Therefore, these cases are distinguishable from the instant case.

We conclude that the Appellant was not entitled to an evidentiary hearing on the voluntariness of his plea where his plea was entered on the alleged misadvice of his defense counsel as to the potential for enhanced penalties for Appellant's future criminal behavior. *See Scott v. State,* 813 So.2d 1025 (Fla. 3d DCA 2002) (holding that a "defendant is not entitled to relief where he has been given affirmative misadvice regarding the possible sentence- enhancing consequences of a plea in the event that the defendant commits a new crime in the future"). Accordingly, although we find the trial court's reasoning for summary denial to be erroneous, we affirm the trial court's ultimate decision to deny relief on Appellant's affirmative misadvice claim. [FN5]

FN5. *See In re Estate of Yohn,* 238 So.2d 290, 295 (Fla.1970) ("if the lower court assigns an erroneous reason for its decision the decision will be affirmed where there is some other different reason or basis to support it.").

In reaching this conclusion, we recognize that the Florida Supreme Court has recently held that neither the trial court nor counsel has a duty to inform a defendant of the future sentence-enhancing consequences of his plea. *Major v. State,* 814 So.2d 424 (Fla.2002). [FN6] However, the Appellant ***631** in the instant proceedings alleged affirmative misadvice by his attorney, not failure to advise, as to the potential for enhanced penalties for future criminal behavior. Although the question addressed in *Major* is different from the issue presented in this case, based upon the importance of this related issue, we also certify the following question of great public importance:

FN6. In *Major,* there was no allegation by the defendant of active misadvice by his attorney. The defendant in that case alleged that his attorney failed to advise him that his 1993 conviction pursuant to his plea could be used as a basis for enhancing a sentence for a future crime.

WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCE-ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA FOR FUTURE CRIMINAL BEHAVIOR IN AN OTHERWISE FACIALLY SUFFICIENT MOTION ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL

CLAIM.

AFFIRMED; QUESTION CERTIFIED.

PADOVANO, J., concurs; ALLEN, C.J., concurs in part and dissents in part.

ALLEN, C.J., concurring in part and dissenting in part.

As the majority explains, the appellant's claim that his counsel was ineffective in failing to present a motion to suppress evidence would not have been cognizable by petition for writ of error coram nobis. I therefore join the majority in affirming the trial court's denial of this claim.

I would, however, reverse the trial court's summary denial of the appellant's claim that he is entitled to withdraw his plea because the plea would not have been entered and he would have proceeded to trial except for his trial counsel's positive misadvice that his conviction could not be used to enhance future sentences. I would do so because the motion contains the necessary allegations to state a claim for relief and the trial court has not attached portions of the record conclusively refuting those allegations.

In *State v. Ginebra,* 511 So.2d 960 (Fla.1987), the supreme court held that a defense attorney must advise a defendant of only the direct consequences of his plea as enumerated in Florida Rule of Criminal Procedure 3.172(c) in order to provide effective assistance of counsel in conjunction with this aspect of the representation. The court left open the issue of whether "positive misadvice" as to a collateral consequence of a plea might amount to ineffective assistance. *Id.* at 962 n. 6. But subsequent decisional law makes it clear that where such misadvice leads a defendant to enter a plea he otherwise would not have entered, both the performance and prejudice prongs of *Strickland* are satisfied and the plea may be withdrawn. *See, e.g., State v. Leroux,* 689 So.2d 235 (Fla.1997); *State v. Sallato,* 519 So.2d 605 (Fla.1988); *Romero v. State,* 729 So.2d 502 (Fla. 1st DCA 1999); *Burnham v. State,* 702 So.2d 303 (Fla. 1st DCA 1997). These post-*Ginebra* decisions are fully consistent with federal precedent. *See, e.g., Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Despite the fact that the appellant in the present case has alleged what would otherwise be a colorable claim for relief under these decisions, the majority holds that his claim must fail. Without disputing the appellant's sworn assertion that he gave up his constitutional right to a jury trial based on erroneous advice from his counsel, the majority concludes that the appellant will nevertheless be denied relief. In reaching this conclusion, the majority reasons that telling a defendant that his plea in a pending case might result in enhancement of his sentence for a future crime ***632** would encourage recidivism. I confess some difficulty in following this logic. I can easily understand how giving a defendant this information might discourage him from entering a plea, but I have difficulty understanding how it might encourage him to commit crimes in the future. What seems to be at the root of the majority's reasoning is its disapproval of the appellant's thought processes in deciding whether to enter his plea. Although I make no effort to offer moral justification for the thoughts that might have passed through the appellant's mind as he decided whether to enter a plea or proceed to trial, I cannot help but observe that the majority has suggested a more complex meaning for the term "involuntary plea" than I have previously understood. The majority creates two classifications of involuntary pleas, those that are involuntary by virtue of appropriate considerations (and thus entitled to legal remedy) and those that are involuntary by virtue of inappropriate considerations (and thus entitled to no legal relief). Because I do not understand the Sixth Amendment rights to trial by jury and effective assistance of counsel to be limited in this fashion, I cannot join the majority in this departure from settled law.

I join the majority in certifying the question of great public importance. And I also note that an additional basis for supreme court review is conflict between the decision herein and the decisions in *Love v. State,* 814 So.2d 475 (Fla. 4th DCA 2002), and *Smith v. State,* 784 So.2d 460 (Fla. 4th DCA 2000).

818 So.2d 626, 27 Fla. L. Weekly D1464

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