

IN THE COUNTY COURT, EIGHTEENTH
JUDICIAL CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO: 95-13193MMA
DIVISION:

STATE OF FLORIDA

VS

_____ /

MOTION FOR POST-CONVICTION RELIEF
AND TO VACATE JUDGMENT AND SENTENCE

The Defendant, ***, by and through the undersigned counsel, pursuant to Florida Rules of Criminal Procedure 3.850, hereby moves this Honorable Court for its Order vacating the defendant's judgment and sentence in the above referenced cause. As grounds in support of this motion, Defendant states as follows:

1. The Defendant, ***, on August 10, 1995, entered a plea of Nolo Contendere to the charge of open carrying of a weapon.
2. On August 10, 1995, in response to the defendant's plea of no contest, the Court withheld adjudication of guilt, imposed a sentence of \$50.00 fine plus court costs and attend a firearms safety class within 90 days of said sentence.
3. The defendant did not testify at any trial or pretrial hearings.
4. There was no appeal taken from the defendant's judgment and conviction.
5. There have been no previously filed petitions, applications, motions, etc., with respect to the judgment in this cause.
6. The defendant was represented by Jack W. Hunter, Jr., retained counsel.

7. The defendant's conviction was obtained by a plea of no contest which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and consequence of the plea.

8. At the time of the defendant's plea on August 10, 1995, the defendant was not and is not presently a United States citizen.

9. The defendant's plea was not voluntarily entered in that prior to acceptance of the defendant's plea, pursuant to Florida Rules of Criminal Procedure 3.172(c), the trial court failed to determine the voluntariness of the defendant's plea by failing to determine that the defendant understood:

- (a) the nature of the charges to which the plea was offered, the mandatory minimum penalty provided by law, if any, a maximum possible penalty provided by law;
- (b) that the defendant had the right to be represented by an attorney at every stage of proceedings against her and, if necessary, that an attorney would be appointed to represent her;
- (c) that the defendant had the right to plead not guilty and to persist with that plea and that the defendant had the right to be tried by a jury and at that trial have the right to the assistance of counsel, the right to compel attendance of witnesses on his behalf, the right to confront the prosecutions' witnesses against him and the right not to be compelled to incriminate himself;
- (d) that if the defendant pleads guilty, or nolo contendere without an express reservation of the right to appeal, she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not waive the right to review by appropriate collateral attack;
- (e) that if the defendant pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere she waives the right to a trial;

- (f) that if the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about which she has pleaded, and if the defendant answers these questions under oath, on the record, or in the presence of counsel, the answers may later be used against her in a prosecution for perjury;
- (g) the complete terms of any plea agreement, including specifically all obligations to the defendant will occur as a result; and
- (h) if she pleads guilty or nolo contendere the trial judge must inform him or her that if he or she is not a United States citizen, the plea may subject her to deportation pursuant to the laws and regulations governing the United States Immigration Naturalization Services.

10. As a result of the defendant's plea in the above reference cause, the defendant is being deported by the United States government. *See Attached Exhibit A.*

11. The defendant would not have entered her plea if she had been informed that her plea might have subjected her to deportation under the laws and regulations governing the United States Immigration Naturalization Services.

12. Pursuant to *Wood v. State*, 34 F.L.W. §240 (Fla. May 27, 1999) this motion for post conviction relief is timely filed.

13. The failure to inform Ms. *** that her plea could subject her to deportation has established prejudice to Ms. *** mandating the granting of her motion for post conviction relief. *See Hen Lin Lu v. State*, 683 So.2d 1110 (Fla. 4th DCA 1996); *Sanders v. State*, 685 So.2d 1385 (Fla. 4th DCA 1997).

WHEREFORE, the Defendant, ***, respectfully moves this Honorable Court to grant all relief to which defendant may be entitled in this proceeding, including but not limited to, vacating the defendant's August 10, 1995 plea and conviction in this cause.

Respectfully submitted,

WILLIAM MALLORY KENT
Florida Bar No: 0260738
24 North Market Street
Suite 300
Jacksonville, Florida 32202
(904) 355-1890 Telephone
(904) 355-0602 Facsimile
kent@williamkent.com
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

_____ I HEREBY CERTIFY that a copy of the foregoing document has been delivered via hand delivery to: Office of the State Attorney, Brevard County Courthouse, 700 South Park Avenue, Titusville, Florida 32780, this ___ day of June, 2000.

William Mallory Kent

VERIFICATION

STATE OF FLORIDA

COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this day personally appeared, ***, who, being first duly sworn, deposes and says that she is the defendant/movant and she has read the foregoing Motion for Post Conviction Relief, has personal knowledge of the facts and matters set forth and alleged, and that each and all of these matters are true and correct.

The foregoing instrument was acknowledged before me this ___ day of June, 2000, by ***, who has produced _____ as identification.

NOTARY PUBLIC

My commission expires:

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SUPPLEMENTAL MOTION FOR ORDER GRANTING RELIEF

The Defendant, ***, by and through the undersigned attorney, respectfully requests this Honorable Court enter an order granting the Defendant's requested relief in this matter, and in support thereof would state as follows:

On October 5, 2000 Petitioner filed ***' Motion for Post-Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850 raising a *Peart* issue (*Peart v. State*, 756 So.2d 42 (Fla. 2000) failure to advise defendant at change of plea of deportation consequences prejudicial error entitling defendant to withdraw plea without alleging would have been found not guilty at trial), under authority of *Wood v. State*, 750 So.2d 592 (Fla. 1999) (abolishing writ of error coram nobis and setting two year time limit for claims that would have come under coram nobis). Petitioner expressly relied on the authority of two Fourth District cases, *Hen Lin Lu v. State*, 683 So.2d 1110 (Fla. 4th DCA, 1996) and *Sanders v. State*, 685 So.2d 1385 (Fla. 4th DCA 1997). Copies of *Peart*, *Wood*, *Hen Lin Lu* and *Sanders* are attached hereto for the court's convenience.

Petitioner's petition under Rule 3.850 was facially sufficient in form and substance (it was properly sworn to by the petitioner and included a sworn affidavit from petitioner's trial counsel supporting her claims).

This Honorable Court entered an order on January 25, 2001, which directed the State Attorney's Office to file an Answer to Defendant's Motion within twenty (20) days of the date of said order. The Answer was due on February 14, 2001. The state has never responded and is in violation of this Court's order.

Thereafter on or about April 2001 Petitioner filed a Motion for Order Granting Relief, in which Petitioner set forth the procedural history of the case, the lack of the state's response to the Court's order requiring a response, and requested that this Court enter an order granting the

Petitioner's requested relief. The state has filed no response to that motion.

Wherefore, the Petitioner respectfully requests this honorable Court enter its Order granting
Petitioner *** her requested relief, that is, that her conviction and plea be set vacated and set aside.

A proposed order is included herewith for the Court's convenience.

Respectfully submitted,

LAW OFFICE OF
WILLIAM MALLORY KENT

WILLIAM MALLORY KENT
Florida Bar No: 0260738
24 North Market Street
Suite 300
Jacksonville, Florida 32202
(904) 355-1890 Telephone
(904) 355-0602 Facsimile
ATTORNEY FOR ***

CERTIFICATE OF SERVICE

_____ I HEREBY CERTIFY that a copy of the foregoing motion was served via United States Postal Service this 13TH day of August, 2001 to: Office of the State Attorney, Brevard County Courthouse, 700 South Park Avenue, Titusville, Florida 32780.

William Mallory Kent