

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2006

HAROLD CHARLES,

Appellant,

v.

Case No. 5D05-3793

STATE OF FLORIDA,

Appellee.

Opinion filed February 10, 2006

3.850 Appeal from the Circuit Court
for Orange County,
Walter Komanski, Judge.

Harold Charles, Bradenton, pro se.

Charles J. Crist, Jr., Attorney General,
Tallahassee, and Kristen L. Davenport,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

Appellant challenges the order summarily denying his Florida Rule of Criminal Procedure 3.850 motion wherein he alleges that his plea of *nolo contendere* to two counts of lewd or lascivious battery was involuntary because he was not advised that he could be subject to deportation as a consequence of his plea. The trial court found that Appellant failed to show he was actually threatened with deportation and summarily denied the motion. We disagree.

Appellant is not a United States citizen. Florida Rule of Criminal Procedure 3.172(c)(8) requires a trial judge to inform a defendant that if he pleads guilty or *nolo contendere* and is not a United States citizen, the plea may subject him to deportation. To obtain postconviction relief based on a rule 3.172(c)(8) violation, the defendant must establish that: (1) he did not know the plea might result in deportation; (2) he is “threatened” with deportation because of the plea; and (3) had he known of the possible consequence, he would not have entered the plea. See *Peart v. State*, 756 So. 2d 42 (Fla. 2000); *Payne v. State*, 890 So. 2d 284 (Fla. 5th DCA 2004). Appellant alleged all three elements in his motion. Appellant attached two documents to his motion. The first document was a notice from the Immigration and Naturalization Service that Appellant was subject to deportation based, in part, on being convicted of acts constituting a crime involving moral turpitude. The second was an order from an immigration judge denying Appellant’s requests for asylum and for withholding of deportation.

Based on the documents attached to the motion, the trial court’s finding that Appellant failed to show he was actually threatened with deportation is not supported by the record. As Appellant’s motion is otherwise facially sufficient, he is entitled to an evidentiary hearing on his motion. Accordingly, this cause is reversed and remanded to the trial court to conduct an evidentiary hearing on Appellant’s motion.

REVERSED and REMANDED.

THOMPSON, PALMER and TORPY, JJ., concur.