OA 3-6-85

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 7 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

STATE OF FLORIDA,)
Petitioner,) CASE NO. 65,495
vs.)
CARL LEE HICKS,)
Respondent.)
)

PETITIONER'S REPLY BRIEF ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner relies on the preliminary statement contained in its initial brief.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts found in its initial brief.

POINT INVOLVED ON APPEAL

WHETHER THE COURT APPOINTED COUNSEL FOR INDIGENT DEFENDANTS SHOULD BE MANDATORY IN ALL REVOCATION OF PROBATION PROCEEDINGS?

ARGUMENT

COURT APPOINTED COUNSEL FOR INDIGENT DEFENDANTS SHOULD NOT BE MANDATORY IN ALL REVOCATION OF PROBATION PROCEEDINGS.

Respondent essentially argues that because there is "precious little" a court-appointed attorney can do at a sentencing hearing once the judge has determined to revoke probation, all indigent defendants should be entitled to representation by court-appointed counsel at violation of probation proceedings. Petitioner maintains however, that Respondent's argument is unpersuasive since the United States Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed. 2d 656 (1973), has squarely held that due process does not require appointment of counsel in all probation revocation proceedings. The Gagnon Court clearly held that an indigent probationer is entitled to court-appointed counsel during revocation proceedings only when he denies committing the alleged violation or when there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

The State maintains that neither of these reasons, requiring court-appointed counsel, were present in Respondent's case. At the first hearing on the violation of probation, the trial court read to Respondent the alleged violations of his conditions of probation (R.3-4). The trial court established that Respondent was sixteen (16) years old, had a ninth-grade education and could read and write, before asking him if he admitted or denied the allegations against him (R.5). Respondent

never denied committing the burglary, and in fact admitted to it. Clearly, there was little an attorney could do to justify Respondent's actions to the court. Petitioner would also point out that the rights which Respondent complains were not afforded him such as the right to be heard and present witnesses and evidence and the right to confront and cross-examine adverse witnesses against him would not come into play unless Respondent denied all of the allegations against him. It is thus clear that based on the standards for appointment of counsel set forth in Gagnon, supra, Respondent was not entitled to court-appointed counsel at this stage of the proceedings.

Respondent, however, was entitled to, and was appointed counsel for purposes of sentencing. Contrary to Respondent's assertions otherwise, the function of counsel at a sentencing hearing is clear. It is the duty of counsel to investigate and present to the trial court alternatives to incarceration.

Petitioner would further point out that Respondent's attempt to analogize the present case to the United States Supreme Court case of Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), must also fail. The difference between Gideon, Supra, and the instant case is the difference between a criminal trial and a probation revocation hearing. In a criminal trial a defendant is presumed innocent and that presumption of innocence does not dissipate unless he is found guilty beyond a reasonable doubt. However, in a probation revocation hearing, the probationer has already been convicted of a crime, his guilt having been previously established. The

only question to be answered is whether the conscience of the court has been satisfied that a material violation of probation has indeed occurred. Bernhardt v. State, 288 So. 2d 490 (Fla. 1974). Thus, the difference in the standard of proof which is needed to establish guilt at a criminal trial, and to establish a violation of probation at a revocation hearing, is the determining factor which requires appointment of counsel at the former and not the latter.

Further, the differences in the above-mentioned proceedings were also the basis for the Gagnon Court's express adoption of the case-by-case approach to determining appointment of counsel and its clear rejection of a per se rule. The Court stated:

> In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in Betts v. Brady, 316 U.S. 455 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), was later rejected in favor of a per se rule in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). See also Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). We do not, however, draw from Gideon and Argensinger the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences. Gagnon at 789

Petitioner submits that should this Honorable Court be concerned with the possibility that if it rejects the Fourth District's opinion in Hicks, supra, and approves the First District's opinion in Sanderson v. State, 447 So. 2d 374

(Fla. 1st DCA 1984), that the case-by-case approach to appointment of counsel would be unworkable and that indigent defendants would not be appointed counsel in probation revocation proceedings, such concern would be unfounded. See, e.g., the First District's recent opinion in Holmes v. State, 448 So. 2d 1070 (Fla. 1st DCA 1984), in which the court recognized its opinion in Sanderson and still ordered that because of the complexity of the case, the defendant under Gagnon, supra, should have been afforded appointed counsel at his probation revocation proceeding.

In summary, the United States Supreme Court has clearly held in Gagnon, supra, that a probation revocation proceeding is unlike a criminal trial and that appointment of counsel is not always necessary in order to ensure due process of law. Since the issue was not raised in terms of Florida constitutional law by Respondent and since the Fourth District did not decide the issue on state constitutional law, the State respectfully submits that this Court should follow the United States Supreme Court's controlling precedent in Gagnon, supra. If this is done, the Fourth District's conclusion that appointed counsel was required under the facts and circumstances of Respondent's case should be reversed.

SUMMARY OF ARGUMENT

This Honorable Court should reject the per se rule for appointment of counsel announced in Hicks, supra, and should rather adopt the rule of law announced in Sanderson, supra, as the law of this State. Further, the State submits that under the facts and circumstances of this case, Respondent was not entitled to court-appointed counsel at his probation revocation hearing.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Petitioner respectfully request that the Judgment and Sentence of the trial court be affirmed, and the decision of the Fourth District Court of Appeal be reversed.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

Carolyn V. McCann

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the Petitioner's Reply Brief on the Merits has been furnished to MARGARET GOOD, ESQUIRE, Assistant Public Defender, 224 Datura Street/13th Floor, West Palm Beach, Florida 33401 by mail/courier, this 4th day of February, 1985.

Carolyn V. McCann
OF COUNSEL