O. a. 3-6-85

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 65,615

MARTIN K. SANDERSON,

Respondent.

_____/

PETITIONER/CROSS-RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Martin K. Sanderson was the defendant in the Circuit Court of Nassau County, and the appellant in the District Court of Appeal, First District. The State of Florida was the prosecuting authority and the appellee in the First District Court of Appeal. The parties will be referred to as they appear before this Court. Citations to the record on appeal will be made by use of the symbol "R," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State adopts as its statement of the case and facts the following excerpt from the First District's opinion in Sanderson v. State, 447 So.2d 374, 375-376 (Fla. 1st DCA 1984):

> Sanderson appeals both the order revoking his probation and the sentence for burglary, the offense for which he had been placed on probation. Appellant, who was not represented by counsel in the revocation and sentencing proceedings, claims that he had a right to appointed counsel at such proceedings and that his purported waiver of counsel was insufficient. We affirm as to the revocation phase of the proceedings but reverse as to the sentencing phase.
>
> In January, 1983, appellant was adjudged guilty of burglary of a conveyance and placed on probation for a period of one year. In June, 1983, after having been charged with a violation of probation, appellant's probation was extended by an additional year and he was ordered to pay court costs.
>
> On July 25, 1983, another probation violation affidavit was filed charging appellant with having moved to Atlanta, Georgia, without obtaining permission from his probation officer in violation of the condition of the probation order prohibiting such action without express authorization.
>
> Appellant appeared before the trial court on August 18, 1983, and was served with a copy of the affidavit which set forth the specifics of the alleged violation. In response to the court's inquiry as to whether appellant wished to employ an attorney, appellant replied in the affirmative. The court then scheduled the case for September 8 and advised the appellant to have his attorney contact the court as soon as appellant had employed one.

On September 8, 1983, appellant's case was called, and the following colloquy occurred:

> THE COURT: Mr. Sanderson, you are before the Court today, the Court having instructed you to obtain the services of an attorney to represent you in this violation of probation.
>
> Have you talked to an attorney?
>
> THE DEFENDANT: No, sir. Is it possible for me to represent myself?
>
> THE COURT: Yes, sir; certainly. I will ask you to sign a Waiver of Counsel. (Defendant signing)

There was no dialogue between the court and appellant regarding his right to counsel. The form which the court requested appellant to sign appears in the record and is set forth as follows:

> I, the undersigned, hereby state that the following facts are true:
>
> 1. I have been advised of my Constitutional right to be represented by an attorney;
>
> 2. I have been advised that if I am unable to employ an attorney that the Court will appoint an attorney to represent me in this case.
>
> 3. I understand the charge involving me in this case and that it could result in a fine or commitment to jail, or both, if I am found guilty.
>
> 4. No one representing the Court has offered me any promise or favor or reward, and I have not been in any manner threatened or made afraid.

5. I have read this paper and I understand its contents.

6. Of my own free will I do hereby waive any right to an attorney and elect to proceed without benefit of an attorney during the proceedings in Nassau County Circuit Court.

The form bears the signatures of appellant and a deputy clerk.

After the appellant acknowledged having previously received a copy of the violation affidavit, the court inquired as to whether he wished to plead guilty or not guilty. The appellant pled guilty. The court then invited appellant to present any mitigating statements and evidence which the appellant wished the court to hear. The appellant informed the court that his Atlanta employer was present to speak on his behalf. The court heard the testimony of the employer, a former high school classmate of appellant, who stated that the appellant, if allowed to remain on probation, could continue to work at his paint and body shop. The employer said that he had recently encountered appellant in Jacksonville and offered appellant a job and that appellant accepted and has been living with him in Georgia for a month. Appellant did not inform him that he was on probation.

As to the reason for appellant's failure to contact the probation officer before leaving the state, appellant explained that the job was offered late on a Friday night, that he did not have time to call his probation officer and that he had to get a job to pay the court costs previously ordered by the court. The court then revoked the appellant's probation and imposed a one-year sentence.

In addition to the facts as stated by the First District, the Court should be aware that the same trial court had

previously handled Respondent's original sentencing proceeding. At that hearing, Respondent testified that he was 23 years old, had had 12 years of education, worked as a plasterer, had never been treated for mental illness, and had never been treated for any mental problems or emotional problems (R 5).

Counsel for the State has learned from opposing counsel that Respondent is no longer in custody because his sentence has expired. However, this should not defeat the Court's jurisdiction because the Court's jurisdiction is based upon conflict of cases rather than the status of the defendant. See Article V, Section 3(b)(3), Florida Constitution.

ARGUMENT

ISSUE I

RESPONDENT EXECUTED A VALID WAIVER OF COUNSEL PRIOR TO THE REVOCATION OF PROBATION PROCEEDINGS, AND BY REQUIRING THE TRIAL COURT TO RENEW THE OFFER OF COUNSEL AT THE SENTENCING PROCEEDING WHICH OCCURRED JUST AFTER RESPONDENT'S PROBATION HAD BEEN REVOKED, THE FIRST DISTRICT EXALTED FORM OVER SUBSTANCE CONTRARY TO THIS COURT'S HOLDING IN JONES V. STATE, 449 So.2d 253 (Fla. 1984).

It cannot be disputed that Respondent asked the trial court if he could represent himself (R 15) after Respondent had been given an opportunity to procure counsel of his choice (R 15). It also cannot be disputed that Respondent showed up at the September 8, 1983, hearing without an attorney and asked the trial court if he could represent himself (R 15). The record contains a form entitled Waiver of Counsel (R 66), which was signed by Respondent at the September 8 hearing. Although there is no colloquy between the trial court and Respondent, the form reveals that Respondent had been told that he could have counsel appointed for him, that the charges against him could result in a fine or commitment to jail or both, that no promises or threats had been made to him, that Respondent had read the paper and understood its contents, and that on Respondent's "own free will I do hereby waive any right to an attorney and elect to proceed without benefit of an attorney during the proceedings in Nassau County Circuit Court." (R 66)

Similarly, it cannot be disputed that Respondent was appearing before the same trial court which had that same year heard Respondent testify under oath that he was 23 years old, had 12 years of education, worked as a plasterer, had not been treated for any mental illness, and had not been treated for any other type of mental or emotional problem (R 5).

On direct appeal, the State argued that based on the above information, the record reflected a knowing and voluntary waiver of counsel at the revocation of probation proceeding. The First District disagreed and held that the trial court had not complied with the requirements of Fla.R.Crim.P. 3.111(d). The State's position in this Court on this issue is that the First District erroneously found that there was no valid waiver of counsel and under Jones v. State, supra, the trial court did not have to renew an offer of counsel to Respondent at the sentencing proceedings which occurred immediately after Respondent's probation had been revoked.

Rule 3.111 does not formally require that there be a colloquy between the trial court and the defendant who is waiving his right to counsel. All the rule requires is that there is a thorough inquiry into the defendant's comprehension of the offer of counsel and his capacity to make that choice intelligently. See Rule 3.111(d)(2). The State submits that the waiver of counsel form, coupled with Respondent's intelligent conduct during all his court proceedings--especially the trial court's previous dealings

with Respondent that same year, demonstrate on the record a knowing and voluntary waiver of counsel.

The First District relied upon several cases to support its conclusion that there had been no valid waiver of counsel. However, the basis of most of these cases was the fact that a criminal defendant is entitled to certain rights at a criminal trial which should not be found waived by a trial court without a thorough inquiry. However, the State submits that such a thorough inquiry is not necessary in a probation revocation proceeding because "[a]lthough a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding." Minnesota v. Murphy, ___ U.S. ___, 79 L.Ed.2d 409, 425, n. 7 (1984). See also Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

In Gagnon, supra, which will be discussed in detail in the second part of this brief, the United States Supreme Court held that because probation revocation proceedings were different from criminal trials in that the defendant had already been convicted of a crime in order to be placed on probation, appointed counsel was not constitutionally mandated. Inexplicably, the First District recognized that Respondent's case was precisely the type of case which under Gagnon a lawyer was not necessary for a fair determination of the issue, yet the court applied the rationale and analysis of what is required for a successful waiver of counsel for a criminal trial rather than the more simplified

probation revocation proceeding. In other words, the First District used a much more stringent standard, i.e., the standard for waiver of counsel before trial, than what is appropriate for a simple probation revocation proceeding. The best evidence that the wrong analysis was applied is that the First District turned around and found that Respondent's case was so simple that a lawyer was not needed under Gagnon.

If the Court agrees with the State that the record before the District Court of Appeal should have been found sufficient by that court to demonstrate a waiver of counsel for the revocation proceeding itself, then the Court should find that under Jones v. State, 449 So.2d 253 (Fla. 1984), the First District should not have exalted "form over substance" by requiring the offer of counsel to be renewed at the sentencing proceeding which occurred immediately after Respondent's probation had been revoked. In that regard, if in a capital case like Jones, an offer of counsel need not be renewed under Rule 3.111 after the defendant has waived counsel in his first degree murder trial, it would be anomalous to require an offer of counsel to be renewed in a probation revocation proceeding, which is clearly unlike a criminal trial. Minnesota v. Murphy, supra; Gagnon v. Scarpelli, supra.

It is important to recognize that the State is not arguing that probationers are not entitled to counsel during sentencing after their probation has been revoked.

See Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). All the State is arguing here is that once counsel has been waived, it is not prudent to require a trial judge to "exalt form over substance," Jones, supra, by requiring an offer of counsel to be renewed just minutes after probation has been revoked.

The State urges the Court to follow the spirit and rationale of Jones in this case. Rule 3.111 was not strictly followed in Jones, and it should not have been reversible error for it not to have been followed in Respondent's case. See State v. Wilson, 276 So.2d 45, 47 (Fla. 1973), in which this Court held that it was reversible error for a district court not to apply the harmless error doctrine when a rule of procedure had been violated. Accordingly, if the Court agrees with the State that the waiver of counsel was sufficient, the State respectfully urges that the Court reverse the portion of the First District's opinion which required a new sentencing hearing. Jones v. State, supra.

ISSUE II

THE FIRST DISTRICT CORRECTLY FOLLOWED CONTROLLING FEDERAL LAW WHEN IT RULED THAT THE UNITED STATES CONSTITUTION DOES NOT REQUIRE APPOINTMENT OF COUNSEL IN ALL PROBATION REVOCATION PROCEEDINGS.

In Gagnon v. Scarpelli, supra, the United States Supreme Court clearly held that the United States Constitution does not require appointment of counsel in all probation revocation proceedings. Indeed, even counsel for Respondent expressly admitted that in his initial brief in the First District Court of Appeal. See Initial Brief of Appellant at 4. Respondent never argued in the lower court that there was a Florida constitutional right to appointed counsel during a revocation proceeding although counsel for Respondent erroneously cited cases which allegedly established such a right under the Florida Constitution. Counsel for the State has reviewed those cases and has determined that the Florida Constitution was not even mentioned in a single case, and to the contrary, the cases relied upon the United States Supreme Court's opinions in Gagnon, supra, and Mempa, supra.

In any event, it was never argued below that there was such a state constitutional right--instead, Respondent's argument below was that the waiver was insufficient. Although the First District agreed with Respondent concerning the waiver, see Issue I, the First District concluded that it made no difference whether Respondent had waived counsel

at the revocation proceeding because under federal law, no such right to counsel existed. Therefore, the only aspect of this issue which is properly before the Court concerns whether the First District correctly applied Gagnon, supra, to the facts of Respondent's case.

In Gagnon, supra, at 411 U.S. 790, 36 L.Ed.2d 666, the Court noted that it was "neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements." However, the Court went on to state that presumptively counsel should be provided if the defendant either has not admitted he violated a condition of his probation or even if the violation is admitted, there are other complex reasons which would make assistance of counsel appropriate. The State submits that the First District correctly found that neither of these reasons were present in Respondent's case. First, it was never even disputed by Respondent that he had moved to Georgia without notifying his probation officer. Second, as the First District found, the only issue was whether Respondent offered a good enough reason in mitigation in order to prevent the trial court from revoking probation. Respondent's reason for leaving without notifying his probation officer was because he did not have enough time--the First District correctly found that there was little a lawyer could do to expand this reason into proper justification for

violating a condition of probation. Moreover, as the First District also found, Respondent did a credible job of presenting his evidence to the trial court. Under Gagnon, this is a consideration, i.e., whether a defendant is articulate and able to express his thoughts. Accordingly, the State requests that the Court agree with the First District that if there ever were a case involving revocation of probation in which a lawyer was not necessary to afford the defendant due process, this was the case.

Presumably, this Court accepted review of this case because it is in express and direct conflict with decisions of the Fourth District Court of Appeal which have, in effect, adopted a per se rule that counsel is required in all probation revocation proceedings regardless of whether the defendant is articulate and regardless of whether the case is complex and whether the defendant has admitted his guilt. See, e.g., Hicks v. State, 452 So.2d 606 (Fla. 4th DCA 1984), Thomas v. State, 452 So.2d 609 (Fla. 4th DCA 1984), Hooper v. State, 452 So.2d 611 (Fla. 4th DCA 1984), and Williams v. State, 452 So.2d 618 (Fla. 4th DCA 1984). It is the State's position that not only are these cases in express and direct conflict with Respondent's case, they are also in express and direct conflict with the United States Supreme Court's opinion in Gagnon v. Scarpelli, supra, as well, despite the Fourth District's attempts to distinguish that case.

No matter how the lower court phrased it in Hicks, supra, the fact remains that the United States Supreme Court has squarely held that due process does not require appointment of counsel in a probation revocation proceeding. The fact also remains that the lower court in Hicks ruled to the contrary and found that in Florida, the Federal Constitution requires appointment of counsel in all probation revocation proceedings regardless of the facts and circumstances of each case. The State submits that the better view is that espoused by Judge Glickstein in his partial dissent in Hooper, supra, in which he stated that the question of whether counsel should be appointed in all probation revocation proceedings was a legislative question which should not be made by the judiciary. See Hooper, supra at 452 So.2d 618 (Glickstein, J., dissenting).

The State also agrees with Judge Glickstein's other reasons expressed in his dissent in Hooper concerning why Hicks was wrongly decided. For example, the "fairness" of such a per se rule is merely a value judgment which should be made by representatives of the people rather than by judges. Second, Judge Glickstein effectively pointed out that the basis of the distinction made by the Fourth District in Hicks between that case and Gagnon was the type of proceeding which was under review in Gagnon was different from the proceeding employed in Florida. Judge Glickstein pointed out that there was absolutely no indication in Gagnon that its constitutional rule of law

would apply only to administrative proceedings. Moreover, Judge Glickstein ably pointed out that the United States Supreme Court had set forth the distinction between a probation revocation proceeding and a criminal trial. See Hooper, supra at 452 So.2d 617 (Glickstein, J., dissenting).

The State will not burden the Court by reiterating the additional reasons expressed by Judge Glickstein in his dissent in Hooper which demonstrate why Hicks was incorrectly decided. The State respectfully requests the Court to examine those additional reasons for itself in Hooper, Hicks, supra, Williams, supra, and Thomas, supra.

Should the Court be concerned with the possibility that if it approves the First District's opinion in Sanderson, indigent defendants will 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 in the lower court by Respondent

and since the First 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 First District's conclusion that appointed counsel was not required under the facts and circumstances of Respondent's case should be affirmed.

CONCLUSION

Concerning Issue I, the State respectfully suggests that if the Court agrees with the State that the waiver of counsel was sufficient during the revocation proceedings, then the case is in conflict with Jones v. State, supra, and should be reversed as to whether an offer of counsel had to be renewed just prior to sentencing. Concerning Issue II, the State respectfully requests the Court to follow Gagnon, supra, and refuse to require a per se rule requiring counsel to be appointed in all probation revocation cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 26th day of December, 1984.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL