O/a 3-6-85

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 65,615

MARTIN K. SANDERSON,

Respondent.

______________________/

FILED
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REPLY BRIEF OF PETITIONER/
ANSWER BRIEF OF CROSS-RESPONDENT

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REPLY BRIEF OF PETITIONER/ ANSWER BRIEF OF CROSS-RESPONDENT

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.

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COURT TO RENEW THE OFFER OF COUNSEL AT THE SENTENCING PROCEEDING WHICH OCCURRED JUST AFTER RESPONDENT'S PROBATION HAD BEEN REVOKED, THE FIRST DISTRICT EXALTED FORM OVER SUBSTANCE CONTRARY TO THIS COURT'S HOLDING IN JONES V. STATE, 449 So.2d 253 (Fla. 1984).

The defendant's answer brief has not been responsive to the State's arguments on this issue. Instead of addressing the State's argument that under the facts of this case a valid waiver of counsel did occur prior to the initiation of the probation revocation proceeding, the defendant has argued ipso facto that since the First District found that a valid waiver of counsel had not occurred, that fact must be accepted by this Court.

The First District found that no valid waiver of counsel occurred because it applied the standards of waiver required before a defendant can go to trial without counsel. However, both the First District and now counsel for the defendant have completely overlooked the main thrust of the State's argument--i.e., that the United States Supreme Court has clearly held in Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) that a probation revocation proceeding is not a criminal proceeding and that

appointed counsel is not even necessary under the Constitution. Thus, since there was no right to counsel at the probation revocation proceeding itself, there was no need for the trial court to cause the defendant to execute a waiver of counsel before the revocation proceeding began. The only reason that the waiver is relevant in this case is because the State is contending that since a valid waiver of counsel was executed, under Jones v. State, supra, there was no reason to exalt form over substance by requiring an additional waiver just a few minutes after the initial waiver.

The State wishes to reiterate that it is not arguing that appointed counsel is never required in the probation revocation proceeding. Gagnon itself makes this very clear. See also Bearden v. Georgia, ___ U.S. ___, 76 L.Ed.2d 221, 228, n. 7 (1983), in which the Supreme Court commented that in certain cases "fundamental fairness" would require such appointment during the probation revocation proceeding itself. However, the State further submits that the defendant's case is not such a case--and, in fact, the First District specifically found that if ever there were a case in which a lawyer was not necessary, this was the case.

The defendant's brief has offered several policy reasons why counsel should in all cases be constitutionally mandated at a probation revocation proceeding. However, it is significant that the defendant has not even addressed the United States Supreme Court's opinion in Gagnon in Issue I of his brief. Perhaps counsel is wishing that by

ignoring the fact that the United States Supreme Court has already held that counsel is not constitutionally required in a probation revocation proceeding, the Supreme Court's opinion will disappear. Moreover, instead of addressing Gagnon which has already answered the question, counsel has focused on "this Court's unfortunate opinion in Jones" and argued that Jones is inapplicable to the defendant's case because in Jones there was a valid waiver of counsel whereas in the defendant's case there was not. But doesn't this beg the question--the State is relying upon Jones merely for the proposition that this Court has already held that Rule 3.111 does not require an offer of counsel to be renewed when counsel has just been offered a few minutes before at a different stage of the proceedings.

In summary, Gagnon has already held that appointed counsel is not required at the probation revocation proceeding itself. Since the Florida Constitution was neither raised by the parties below nor discussed by the lower court, the issue before this Court necessarily is restricted to what has already been held in Gagnon. The State's reliance upon Jones is necessary only to the extent that this Court has already held that an offer of counsel does not have to be renewed under Florida procedure if an offer of counsel has just been made literally a few minutes before the sentencing proceeding. Accordingly, since the defendant received all which he was constitutionally entitled, both his revocation of probation and subsequent sentence should be affirmed.

ISSUE II

THE FIRST DISTRICT PROPERLY REFUSED TO OVERRULE THE UNITED STATES SUPREME COURT'S OPINION IN GAGNON V. SCARPELLI.

Incredibly, in this issue, the defendant is asking this Court to reverse the First District because that court declined to overrule Gagnon v. Scarpelli, supra. While the defendant makes some interesting legal arguments, he is making them in the wrong forum--either the Supreme Court of the United States or the Florida Legislature would be more appropriate than this Court.

The defendant's contention that Gagnon v. Scarpelli should not be followed in Florida because Florida probation revocation proceedings are different than the type of proceeding discussed in Gagnon is without merit for at least two reasons. First, as Judge Glickstein aptly pointed out in Hooper v. State, 452 So.2d 611, 618 (Fla. 4th DCA 1984), there is absolutely no indication in Gagnon that the constitutional rule of law announced in that case would be applicable only to administrative proceedings. Second, with the advent of sentencing guidelines, it can be safely said that probation revocation proceedings will no longer be conducted in one hearing. This is because sentencing cannot occur until scoresheets are prepared, and it is logical to assume that scoresheets will not be prepared until the parties know whether probation has been revoked.

The State does not dispute that Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), requires appointment of counsel at sentencing. However, the State does dispute the defendant's argument that Gagnon should not be applicable in Florida because under Florida law, probation is not a sentence. Rather, the State submits that is precisely why Gagnon should not be applicable in the probation revocation proceeding itself.

The defendant has also argued that Gagnon should not be applicable to the probation revocation proceeding because in Florida such a proceeding is similar to that of a criminal trial. However, this argument overlooks what was clearly explained by the Supreme Court in Gagnon--since probation revocation was not a part of the criminal prosecution, counsel was not required. Id. at 411 U.S. 782, 36 L.Ed.2d 662. See also Minnesota v. Murphy, ___ U.S. ___, 79 L.Ed.2d 409, 425, n. 7 (1984). It cannot be overemphasized that the State is not disputing the fact that once a probation revocation proceeding progresses to sentencing, under Mempa, counsel is required. Thus, as the First District noted in the defendant's case, Florida law is in fact consistent with Gagnon.

The defendant's final argument is interesting--according to his records since the public defenders are participating in numerous probation revocation cases already, the Court should require their participation in all cases. The State's response is simple--since the United States Supreme Court

has already held that appointed counsel is not constitutionally required in all cases, only the Legislature should determine whether it wishes to fund appointed public defenders in those cases in which appointed counsel is not constitutionally required under Gagnon. In fact, if the First District's opinion is adopted, perhaps there will be fewer public defenders participating in probation revocation proceedings if the trial courts are aware that such participation is not constitutionally required. See, e.g., Smith v. Brummer, 443 So.2d 957 (Fla. 1984), in which the Court made it clear that public defenders were not statutorily entitled to participate in federal habeas corpus cases.

As a final note, the State would argue that the defendant's characterization of the First District's subsequent opinion in Holmes v. State, 448 So.2d 1070 (Fla. 1st DCA 1984), is misplaced. All Holmes demonstrates is that the courts are perfectly capable of following Gagnon's holding that there are certain cases in which "fundamental fairness" requires appointment of counsel--precisely what occurred in Holmes.

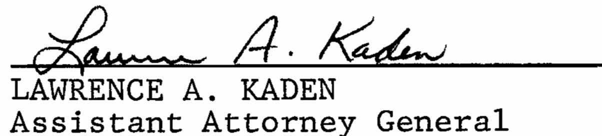
In summary, the United States Supreme Court has already held that the United States Constitution does not require appointment of counsel in a probation revocation proceeding because such a proceeding is not part of the criminal prosecution. This interpretation of the United States Constitution is not negotiable by any court other than the Court in Washington. The defendant's arguments, if made anywhere, should be made to the Florida Legislature.

CONCLUSION

The First District's opinion should be affirmed to the extent that it found that counsel was not constitutionally required in the probation revocation proceeding itself. However, to the extent the opinion held that an offer of counsel must be renewed immediately after the revocation proceeding but just prior to sentencing, the opinion should be reversed under authority of Jones v. State, supra.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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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 4th day of February, 1985.

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OF COUNSEL