C/a 6-3-85

IN THE SUPREME COURT OF FLORIDA

SYLVESTER WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO: 66,075

PETITIONER'S SUPPLEMENTAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the First District Court of Appeal. Respondent was the prosecution in the trial court and the appellee in the First District Court of Appeal. The parties will be referred to herein as they appear before this Court.

The Record on Appeal consists of one volume and will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

After being charged with first degree murder in the Circuit Court of Alachua County, petitioner, an indigent, entered a negotiated plea of guilty to a charge of second degree murder with a firearm (R-1, 17-22 and 108-126). Following entry of his negotiated plea, petitioner was, on May 23, 1983, adjudicated guilty of second degree murder and sentenced to a life term (R-2).

On September 13, 1983, petitioner filed a Motion for Post-Conviction Relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure (R-2). The Motion alleged that petitioner's plea had not been entered freely, voluntarily and with a full understanding of its potential consequences because petitioner had been promised by his court-appointed counsel that he would be sentenced to no more than fifteen years and because he was then under the influence of drugs which limited his ability to understand the possible consequences of his plea (R-2-10).

After reviewing petitioner's Motion and the files and records of the case the trial court determined that an evidentiary hearing should be held and scheduled same for February 1, 1984 (R-13-15).

More than three weeks prior to the scheduled hearing date petitioner moved for appointment of counsel by forwarding a letter to the presiding trial judge. The letter said in part:

> I have received a copy of the order setting the matter for evidentiary hearing ... I am concerned now as to who will assist in representing me as

> counsel at the hearing. I did not prepare the motion alone but had the help of others. I would not be able to represent myself at such hearing and would like to have an attorney appointed to represent me ... Please consider this a motion for appointment of counsel ...
> (R-16)

The trial court reviewed petitioner's letter, wrote "No Response" thereon and initialed same on January 10, 1984 (R-16). Petitioner was not afforded counsel at the evidentiary hearing (R-36-102).

Certain portions of the transcript of the hearing of February 1, 1984, are particularly enlightening. After the prosecutor had questioned the investigator for petitioner's trial counsel for several minutes, petitioner handled the "cross-examination" as follows:

> CROSS EXAMINATION
>
> BY THE DEFENDANT:
>
> Q. Okay, He didn't explain to my mother nothing about life. And I got one more witness that Carlin told that to. She just had an operation -- my sister -- and she couldn't make it.
>
> A. So, what's your question?
>
> Q. The question is Carlin didn't explain to my family nothing about life.
>
> A. That's not a question.
>
> Q. That's not a question?
>
> A. No.
>
> THE COURT: Just ask him in the form of a question. "Did he or --"

THE DEFENDANT: I rather not ask him.

THE COURT: This is your opportunity, Mr. Williams. If you want to ask any questions of the witness, you need to ask the questions. Ask him a question. See, a question is different from a statement. What you're saying is -- you're telling him. You've already testified. So, what you need to do is, if you want to ask a question, just ask the question. Let him testify as to what he remembers.

THE DEFENDANT: Mr. Carlin -- he didn't explain nothing to me about life.

THE COURT: (To Witness:) Did you hear him explain anything to him about life?

THE WITNESS: Yes. Mr. Carlin explained the life sentence.

THE DEFENDANT. Mr. Carlin did not explain any life sentence to me.

THE COURT: You've already testified to that -- your view of it. Is there any questions you want to ask of this witness?

THE DEFENDANT: No questions.

THE COURT: You may step down.
(R-72-73)

And upon direct examination of petitioner's trial counsel, the prosecutor elicited the following testimony without objection:

Q. Now, in the course of dealing with Mr. Williams, while he was in detention, was he on any kind of medication?

A. To the best of my knowledge, Mr. Williams was not on any medication that would affect his ability to reason or to understand.

Having received his motion, I went down to the county jail and reviewed his medical

> record. I found no evidence within that record that he was under any type of medication, psychotrophic or any of that nature. He was on some medication; and when I asked the nurse who was down there, she told me what it was for. I forget what it was for. But it was something not much stronger than aspirin. It was nothing that would affect one's ability to rationalize or to understand.
> (R-89)

On March 14, 1984, the trial court entered its order denying petitioner's motion for post-conviction relief (R-105-106).

Petitioner then took an appeal to the First District Court of Appeal (R-127) which affirmed the trial court and held that the trial court did not abuse its discretion when it failed to appoint counsel to represent petitioner at petitioner's evidentiary hearing. However, the First District Court of Appeal certified the following question to this Court as an issue of great public importance:

> When a trial court has determined that it is necessary to hold an evidentiary hearing on allegations raised in a motion for post-conviction relief, is court-appointed counsel for an indigent defendant mandatory or is such appointment properly left to the discretion of the trial court?

Williams v. State, 455 So.2d 543 (Fla. 1st DCA 1984).

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, Section 3(b)(4), Constitution of the State of Florida, and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, to review the decision of the First District Court of Appeal.

SUMMARY OF ARGUMENT

Fundamental fairness and due process as well as practice under the analogous federal statute indicate that appointment of counsel for an indigent defendant should be mandatory once a trial court determines that an evidentiary hearing upon allegations set forth in a motion under Rule 3.850, Florida Rules of Criminal Procedure, should be held.

The trial court failed to properly apply the rules relating to the appointment of counsel as set forth in Weeks and Graham when it failed to appoint counsel to represent petitioner at the evidentiary hearing on his motion under Rule 3.850, Florida Rules of Criminal Procedure.

For the foregoing reasons the lower courts should be reversed and this cause remanded to the trial court for a new evidentiary hearing upon petitioner's motion, at which petitioner is afforded counsel.

ARGUMENT

ISSUE I

WHEN A TRIAL COURT HAS DETERMINED THAT IT IS NECESSARY TO HOLD AN EVIDENTIARY HEARING ON ALLEGATIONS RAISED IN A MOTION FOR POST-CONVICTION RELIEF, IS COURT-APPOINTED COUNSEL FOR AN INDIGENT DEFENDANT MANDATORY OR IS SUCH APPOINTMENT PROPERLY LEFT TO THE DISCRETION OF THE TRIAL COURT?

This Court first dealt with the issue of right to court-appointed counsel under Criminal Procedure Rule 1, the predecessor to Rule 3.850, Florida Rules of Criminal procedure, in State v. Weeks, 166 So.2d 892 (Fla. 1964). Relying upon the decisions of the United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 93 L.Ed.2d 799 (1963) and Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), and without guideline precedent from this Court, Florida's District Courts of Appeal had held that an indigent was entitled to the assistance of counsel, as a matter of right, on Rule 1 motions in the trial courts and upon appellate review of trial court orders entered under Rule 1. In reversing one such holding this Court indicated that the erroneous holdings of the District Courts of Appeal had occurred as a result of a failure to differentiate the organic entitlements to counsel in direct criminal prosecutions from the claimed right to assistance of counsel in collateral proceedings. In Gideon, supra, and Douglas, supra, the United States Supreme Court had held that the Sixth and Fourteenth Amendments to the United States Constitution entitled indigent

defendants to appointed counsel at the trial level and upon direct appeal, but the United States Supreme Court had never held that there was any such right in a proceeding collateral to the original trial. This Court further pointed out that Rule 1 was simply a Florida adaptation of Title 28, Section 2255, United States Code, the Federal Post-Conviction Statute, and that the federal precedents under Section 2255 should be applied under Rule 1. This Court summarized those federal authorities as follows:

> The sum of the authorities is that post-conviction remedies of the type under consideration are civil in nature and do not constitute steps in a criminal prosecution within the contemplation of the Sixth Amendment, supra. They do not require the application of the standard of absolutism announced by that amendment. Such remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States. This means that in these collateral proceedings there is no absolute right to assistance of a lawyer. Nevertheless, Fifth Amendment due process would require such assistance if the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need.

Weeks, supra, at page 896. This Court did observe, however, that in all these considerations "the proper course would be to resolve doubts in favor of the indigent prisoner when a question of the need for counsel is presented." Weeks, supra, at page 897.

The holding of this Court in Weeks has been followed in subsequent opinions of this Court. See Hooks v. State, 253 So.2d 424 (Fla. 1971) and Graham v. State, 372 So.2d 1363

(Fla. 1979). In Graham this Court set forth the following as important considerations by the trial court in determining whether counsel should be appointed to represent an indigent who has moved for relief under Rule 3.850, Florida Rules of Criminal Procedure:

> The adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research are all important elements which may require the appointment of counsel. This appointment authority is discretionary with any doubts being resolved in favor of an indigent defendant.
> Graham, supra, at page 1366

The certified question in the case at bar does not ask this Court to readdress the issue of whether right to counsel on collateral attack should be held to be co-equal with the right to counsel upon direct criminal prosecution. Rather, the certified question merely asks this Court whether the holdings of this Court in Weeks and Graham should be extended slightly so as to mandate appointment of counsel once the trial court has determined that a colorable or justiciable issue has been presented and that an evidentiary hearing must be held upon the prisoner's motion for post-conviction relief. It is petitioner's position that the Weeks and Graham holdings should be so extended.

By making the model form for use in motions for post-conviction relief, adopted by this Court as Rule 3.987, Florida Rules of Criminal Procedure, available to prisoners in the state prison system and by reliance upon prison "writ writers", indigent

state prisoners have reasonable access to the state post-conviction relief remedy. The importance of this Court's approved form is clearly demonstrated in this case where an indigent prisoner used the Court's approved form and was granted an evidentiary hearing thereupon. And the importance of prison "writ writers" is also demonstrated in this case where petitioner candidly acknowledges that he is "practically illiterate, reading at the second grade level" and that "another inmate filed all the pleadings for petitioner". See page 7 of Initial Brief of Petitioner herein and Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), wherein the United States Supreme Court, through Justice Fortas, discussed the importance of prison writ writers in providing indigent prisoners with access to post-conviction relief. With model forms and writ writers available to assist indigent prisoners in their preparation of motions for post-conviction relief, it is reasonable that the prevailing authority in the United States is to the affect that there is no Fifth Amendment due process right to assistance of counsel at the motion preparation stage of the collateral review process. See Johnson v. Avery, supra, at pages 487-488, and Graham v. State, supra, at page 1366.

But once a trial court determines that a motion for post-conviction relief sets forth a colorable or justiciable issue and that an evidentiary hearing must be held, form motions and prison writ writers are of no further value to the indigent prisoner who is then faced with the prospect of litigating his claim, alone, against a legally educated, trained and experienced

lawyer-prosecutor. To require an indigent, often illiterate or semi-illiterate, prisoner to present his claim against such virtually impossible odds is offensive even to the "more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States." Weeks, supra, at page 896. The petitioner's feeble efforts at self-representation at his evidentiary hearing below is but one example of the injustice which is inherent in a post-conviction review process which does not guarantee the right of counsel at contested evidentiary hearings on post-conviction petitions. This Court should properly hold that such is also offensive and unacceptable under the due process guarantees of Article I, Section 9 of the Constitution of the State of Florida.

In obvious recognition of the fact that it is fundamentally unfair to require an indigent prisoner with a justiciable post-conviction relief issue to litigate his claim at a contested evidentiary hearing without assistance of counsel, the United States Supreme Court prescribed and the United States Congress approved, Rule 8(c), Rules Governing Section 2255 Proceedings, effective February 1, 1977. See Act Sept. 28, 1976, PL 94-426. The Rules Governing Section 2255 Proceedings, as their title would suggest, were enacted by the United States Supreme Court to govern the lower federal courts handling of motions under Title 28, Section 2255, United States Code, the federal statute which Rule 3.850, Florida Rules of Criminal Procedure, and its predecessor, Criminal Procedure Rule 1, were modeled after.

Rule 8(c), Rules Governing Section 2255 Proceedings provides, in pertinent part, as follows:

> If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. §3006A(g) and the hearing shall be conducted as promptly as practical, having regard for the need of counsel for both parties to adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. §3006A at any stage of the proceeding if the interest of justice so requires.

Just as this Court in Weeks, supra, looked to federal precedent and practice under Title 28, Section 2255, United States Code, to establish the contours of the right to appointed counsel under the Florida Post-Conviction Relief Rule, this Court should again look to the federal precedent and practice under Title 28, Section 2255, United States Code, to answer the certified question presented herein. Reference to federal practice on the issue at bar clearly indicates, as is codified in Rule 8(c), Rules Governing Section 2255 Proceedings, that counsel should always be appointed once a trial court determines that it will be necessary to conduct an evidentiary hearing on allegations raised in an indigent defendant's motion for post-conviction relief.

ISSUE II

DID THE COURTS BELOW PROPERLY APPLY THE HOLDINGS OF THIS COURT IN WEEKS AND GRAHAM WHEN THEY HELD THAT PETITIONER WAS NOT ENTITLED TO COURT-APPOINTED COUNSEL TO REPRESENT HIM IN THE EVIDENTIARY HEARING UPON HIS MOTION FOR POST-CONVICTION RELIEF?

Although the undersigned counsel was appointed "for the limited purpose of addressing the certified question," he would be remiss in failing to make at least a brief observation relating to the foregoing issue.

The trial court was imminently correct in finding that an evidentiary hearing was necessary. See Weeks, supra; Bartz v. State, 221 So.2d 7 (Fla. 2d DCA 1969); and Cooley v. State, 245 So.2d 679 (Fla. 4th DCA 1971). But the trial court failed to properly apply the test as set forth in Graham, supra, when in spite of the adversary nature of the proceeding, in spite of the fact that an evidentiary hearing was required, in spite of the fact that a mixed question of law and fact (i.e. voluntariness of plea) was at issue, and in spite of the fact that petitioner was obviously extremely unsophisticated in legal proceedings, the trial court failed to appoint counsel for petitioner. The factual basis for the right to counsel below was analogous to that appearing in Halpin v. State, 448 So.2d 115 (Fla. 2d DCA 1984), where the Second District Court of Appeal held that the trial court had erred in failing to appoint counsel.

CONCLUSION

Fundamental fairness and due process as well as practice under the analogous federal statue indicate that appointment of counsel for an indigent defendant should be mandatory once a trial court determines that an evidentiary hearing upon allegations set forth in a motion under Rule 3.850, Florida Rules of Criminal Procedure, should be held.

The trial court failed to properly apply the rules relating to appointment of counsel as set forth in Weeks and Graham when it failed to appoint counsel to represent petitioner at the evidentiary hearing on his motion under Rule 3.850, Florida Rules of Criminal Procedure.

For the foregoing reasons the lower courts should be reversed and this cause remanded to the trial court for a new evidentiary hearing upon petitioner's motion, at which petitioner is afforded counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Supplemental Brief on the Merits has been furnished to John W. Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, and to Mr. Sylvester Williams, #089845, P. O. Box 500, Olustee, Florida 32072, this 3rd day of April, 1985.

Michael E. Allen

MICHAEL E. ALLEN