IN THE SUPREME COURT OF FLORIDA

HONORABLE MICHAEL E. ALLEN, PUBLIC DEFENDER, SECOND JUDICIAL CIRCUIT, and VINCENT GAYOSO,	:	
Petitioners,	:	CASE NO. 68-564
v.	:	
HONORABLE HAL S. McCLAMMA, COUNTY JUDGE, IN AND FOR LEON COUNTY,	:	
Respondent.	:	
and	:	
HONORABLE MICHAEL E. ALLEN, PUBLIC DEFENDER, SECOND JUDICIAL CIRCUIT, and WILLIE REYNOLDS,	:	
Petitioners,	:	CASE NO. 68-633
v.	:	
HONORABLE HAL S. McCLAMMA, COUNTY JUDGE, IN AND FOR LEON COUNTY,	:	
Respondent.	:	

PETITION FOR WRIT OF MANDAMUS
OR, IN THE ALTERNATIVE,
PETITION FOR WRIT OF PROHIBITION

AMICUS CURIAE BRIEF
OF PUBLIC DEFENDERS' ASSOCIATION

ELTON H. SCHWARZ, PRESIDENT
PUBLIC DEFENDERS' ASSOCIATION

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PRELIMINARY STATEMENT

On April 22, 1986, the Court consolidated the above-captioned petitions filed by Michael E. Allen, Public Defender for the Second Judicial Circuit, co-petitioner VINCENT GAYOSO (Case No. 68-564), and co-petitioner WILLIE REYNOLDS (Case No. 68-633). In each case, Petitioners are asking the Court to issue a writ of mandamus or, alternatively, a writ of prohibition, to compel Leon County Judge Hal S. McClamma to allow the public defender to represent the petitioners/defendants on charges which will be described herein. Rule to Show Cause was entered as to the first case on April 11, 1986, and as to the second case on April 23, 1986.

STATEMENT OF THE CASE AND FACTS

In the first of these consolidated cases, the defendant, Vincent Gayoso, was arrested on February 14, 1986, in Tallahassee, Florida. He was charged with driving while license suspended or revoked (DWLS) and driving under the influence of alcohol (DUI). Although both charges resulted from the same incident and were consolidated for trial on April 11, 1986, the Respondent, Leon County Judge Hal S. McClamma, determinined that the public defender will only be permitted to represent the defendant on the DWLS charge. Respondent based this determination on his entry of an Order of No Imprisonment (ONI) as to the DUI charge.

Not only has the Respondent refused to appoint the public defender as to the DUI charge, but he has ruled that the public defender cannot participate in the defense of that charge by providing legal assistance to defendant, such as whispering to the defendant at counsel table during his consolidated trial. Thus, assuming that the defendant goes to trial on both charges, which is presently anticipated, the assistant public defender will be present but will be representing him only as to the DWLS charge and will be unable to participate or offer legal advise to defendant during the DUI portion of the trial.

On April 11, 1986, Respondent entered another ONI and ordered Petitioner Allen removed from the case of another defendant, Willie Reynolds, whom Petitioner Allen's office had represented for over four months. Willie Reynolds was arrested on

November 23, 1985, and charged with gambling in the parking lot of a convenience store. Petitioner Allen's office was appointed to represent him. Thereafter, the public defender's office conducted discovery, including the taking of depositions, and filed a motion to suppress which was denied. Jury trial was scheduled and reset several times, finally being set for April 14, 1986.

On April 11, 1986, Petitioner Allen received Respondent's "Order of No Imprisonment and Discharging Public Defender." On the date scheduled for jury trial, Petitioner Allen moved to modify the Order to allow him to continue to represent the defendant. At the hearing, Respondent advised Petitioner Reynolds, the defendant, that if the public defender were reappointed, he would risk going to jail. The defendant was offered a choice between being represented by counsel or being denied both counsel and a jury trial, but being guaranteed no jail time (unless, of course, he violates probation). Obviously, the defendant did not choose to risk going to jail. Accordingly, Respondent orally denied the motion and set the case for a non-jury trial on April 28, 1986. At this time, both defendants are awaiting trial.

SUMMARY OF THE ARGUMENT

It is unconstitutional to try a defendant without counsel unless the defendant voluntarily waives his right to counsel after being fully advised of the dangers of proceeding pro se. Faretta v. California, 444 U.S. 806 (1975). A defendant who has been found insolvent is entitled to the appointment of counsel, unless no jail time is imposed, Argersinger v. Hamlin, 407 U.S. 25 (1972), or unless the court enters an Order of No Imprisonment. §27.51(1)(b), Fla. Stat. (1985).

In the first of these cases, Respondent appointed the public defender as to the DWLS charge but not the DUI charge arising from the same incident, because he entered an Order of No Imprisonment as to the DUI charge. There is no authority to appoint counsel as to one charge and not another arising from the same incident. Furthermore, the court must respect the public defender's independent judgment in the defense of his client. State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982); Graham v. State, 372 So.2d 1363 (Fla. 1979).

As to the second of these cases, the Respondent rescinded his appointment of the public defender four months later, after the public defender had prepared the case for trial. Not only must Respondent respect the public defender's independence in representing his client, but also, he cannot discharge appointed counsel on the eve of trial, thus forcing the defendant to proceed pro se, without a compelling reason and a Faretta inquiry as to his competence to represent himself.

ARGUMENT

A WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION, SHOULD BE GRANTED, REQUIRING RESPONDENT TO ALLOW THE PUBLIC DEFENDER TO EXERCISE HIS INDEPENDANT JUDGMENT TO REPRESENT THE PETITIONERS/DEFENDANTS IN THESE THESE TWO CASES.

It is unconstitutional to try a defendant for a felony without a lawyer unless the defendant has validly waived his right to counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). Similarly, it is unconstitutional to try a defendant for a misdemeanor or other offense without a lawyer, or valid waiver of right to counsel, when a jail term is contemplated or imposed. Argersinger v. Hamlin, 407 U.S. 25 (1972). Convictions obtained in violation of Gideon or Argersinger cannot be used against the defendant to support guilt or to enhance punishment for another offense. Baldisar v. Illinois, 446 U.S. 222 (1980) (an uncounseled conviction may not be used to enhance a sentence on a subsequent conviction unless the defendant waived his right to counsel); Harrell v. State, 469 So.2d 169 (Fla. 1st DCA 1985). Accordingly, uncounseled convictions may not be used in calculating a presumptive sentence on a guidelines scoresheet. Chaffin v. State, 480 So.2d 700 (Fla. 4th DCA 1985) (reversed because trial court used three uncounseled misdemeanor convictions to aggravate sentence); Pilla v. State, 477 So.2d 1088 (Fla. 4th DCA 1985) (reversed because five prior uncounseled DWLS convictions were used to habitualize). It is apparently as yet undetermined whether an uncounseled conviction in which an ONI was entered can later be used to enhance a sentence or can be scored on a

guidelines scoresheet, although Pilla, 477 So.2d 1088, would seem to indicate that they would not be scorable.

A DUI charge is a serious matter. Although the Respondent does not intend to impose a jail sentence outright, the Petitioner may well end up incarcerated at a later date, based upon this charge. If he is found guilty, he will most likely be placed on probation. If he violates probation, he will end up in jail. Even if he successfully completes his probationary period, he may later be subject to an increased penalty based on the previous DUI conviction. For example, if he were charged with a second DUI within three years, he would face a mandatory ten days in jail and exposure to nine months in jail. §316.193, Fla. Stat. (1985). Additionally, if he were charged with causing an accident involving serious bodily injury to another while in violation of that statute, after having been previously convicted of a DUI, he could be charged with a felony. §316.1931(2)(b)(3), Fla. Stat. (1985). Although this uncounseled DUI conviction would probably not be scorable on a guidelines scoresheet, if the defendant were later convicted of a felony, it might be used as a reason to depart from the recommended guidelines range which is potentially more serious than one more point on a scoresheet.

The DWLS charge is scheduled to be tried together with the DUI. Although the Respondent has guaranteed the defendant no jail time on the DUI, he has not done so on the DWLS. Therefore, if petitioner/defendant is convicted, the court's sentence as to the DWLS might be influenced as to severity by the related DUI

charge. In fact, it might be difficult to seperate the two for sentencing purposes because they are so interrelated.

Although decided prior to Argersinger and the enactment of secton 27.51(1)(b) of the Florida Statutes, the Florida cases of James v. Headley, 410 F.2d 325 (5th Cir. 1969), and Matthews v. State, 422 F.2d 1046 (5th Cir. 1970), are most helpful as to the first of these two cases. In James, the Fifth Circuit considered the question of whether an accused has the right to court-appointed counsel when charged with only "a petty offense." James, 410 F.2d at 325. This case arose prior to Argersinger and its progeny. Petty offenses were defined as those with potential sentences of less than six months imprisonment and a fine of not more than $500. Id. The court held that a defendant was entitled to counsel even for petty offenses, 410 F.2d at 326, unless no punishment was likely to be imposed or no loss of liberty involved. 410 F.2d at 334. (Interestingly, the court [Judge Wisdom] expressed its opinion that, even when no loss of liberty would result, counsel should be appointed if the crime involved "moral turpitude." An example he gave of a crime involving moral turpitude was "drunken driving." Id.)

The most instructive portion of this case, however, is the trial court's attempt to consider each charge seperately in determining whether the defendants were entitled to counsel. The two defendants were charged with a total of seven misdemeanors, each carrying a maximum sentence of up to 60 days incarceration and a fine of $500. Thus, although no one charge involved more

than 60 days jail time, one defendant was sentenced to a total of 300 days on five charges plus an additional 300 days (later suspended) because she could not pay the fine. The second defendent received a total of 120 days plus 120 days (also suspended) in lieu of the fine. Thus, although no one charge was "serious," the total sentence was certainly serious. 410 F.2d at 326-27. The court refused to accept the contention that criminal offenders would intentionally compound their violations for the purpose of securing free legal counsel. Thus, it held that the total punishment on all charges should be the guide in determining whether counsel must be appointed. 410 So.2d at 329.

The court, in Matthews v. State, 422 F.2d 1046 (5th Cir. 1970), reaffirmed its holding in James. Although it distinguished James because Matthews was tried for three seperate and unrelated misdemeanors, the court noted that "[t]his is not to say that a defendant's right to assistance of counsel can be circumvented by conducting a series of trials for each of several offenses when those offenses grow out of one misadventure or one interrelated stream of events...." 422 F.2d at 1048.

The Matthews court also cited Bohr v. Purdy, 412 F.2d 321 (5th Cir. 1969), in which the defendant was charged with two traffic offenses which together carried a maximum penalty of 90 days in prison. The Fifth Circuit disposed of Bohr in a very brief opinion which simply stated that James v. Headley made it clear that Bohr was constitutionally entitled to counsel. 412 F.2d at 322.

The case of Vincent Gayoso involves the same factual situation; thus, the answer is clear. When considered together, the DUI and the DWLS involve serious consequences, including jail time. The total sentence from all charges arising from the same incident must be the measure of when the appointment of counsel is required. Here, the Respondent has admitted that the DWLS carries a potential jail sentence. Accordingly, §27.51(1)(b), Fla. Stat. (1985), requires that counsel be appointed for the defendant. There is no authority to bifurcate the trial, appointing counsel to defend the petitioner in only half of it.

The present situation is intolerable. It will render assistance of counsel as to the DWLS charge, to which Petitioner Allen was duly appointed, almost completely ineffective. Counsel will be handicapped in his discovery requests and any plea negotiations by being unable to deal with the charges together. The state attorney will be impeded in his negotiations by having to negotiate both with counsel and with the defendant.

If the case goes to trial, as is presently anticipated, the assistant public defender will be unable to effectively defend the petitioner. The defendant's breathalyzer test showed a .09/.08 blood alcohol level, which is below that which raises a presumption of intoxication. Thus, the defendant's guilt is by no means evident. He was also required to perform field sobriety tests. Thus, whether he is found guilty or not guilty will depend largely on testimony by police officers and the defendant himself. If witnesses, such as police officers,

testify as to both charges, the assistant public defender will be able to examine and cross-examine only as to the DWLS portion of the charges or risk being held in contempt of court. When the DUI matter arises, defense counsel will have to sit down and hope for the best - and he will not be permitted to whisper to the defendant at counsel table.

Because the assistant public defender has been forbidden to discuss with petitioner his defense of the DUI, driving, which is an element of both crimes, will need to be proved or disproved for each charge. Furthermore, counsel and petitioner may develop inconsistent defenses. For example, intoxication might be a defense to the DWLS charge - lack of intent. It would convict the petitioner of the DUI, however. Thus, Respondent may be placing the petitioner/defendant and his client at odds.

At the very least, he is interfering with their attorney - client relationship. Moreover, Respondent is interfering in this relationship unnecessarily. The United States Supreme Court has held that Government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions as to its defense of a case. Strickland v. Washington, 80 L.Ed.2d 674, 692 (1984). In the case at hand, the assistant public defender cannot make independent decisions as to his defense of his client without becoming involved in the defense of the DUI.

While Petitioner Allen's office is representing Petitioner Gayoso on the DWLS charge which has been consolidated with

the DUI charge for trial, it makes no sense as a matter of judicial economy to deny the defendant counsel on his DUI charge, risking serious constitutional violations and interfering with the assistant public defender's representation of his client. Petitioner Reynolds' case is even worse. The public defender's office has spent over four months preparing to go to trial on this case. To now deprive the petitioner of counsel is a disgraceful waste of the public defender's time and the state's money. If petitioner were to retain private counsel now, it would undoubtedly necessitate another continuance (the case has already been continued several times), not to mention the possible violation of the defendant's right to a speedy trial.

As a practical matter, Petitioner Reynolds would not be able to retain private counsel. He is insolvent. Instead, he would be forced to go to trial without counsel. The discovery done by the public defender's office would undoubtedly prejudice the defendant's defense. The State now has the benefit of discovery conducted by defense counsel (depositions) and of the defense strategy revealed by the motion to suppress, which would greatly improve its chances of convicting the defendant, if he proceeded pro se.

Even if the defendant gained some information about his case from defense counsel's preparation, he would not know how to use it. Disciplinary Rule 2-110(A) of the Code of Professional Responsibility provides that an attorney shall not withdraw from a case until he has taken reasonable steps to avoid foreseeable

prejudice to the rights of his client, has given due notice to his client allowing time for the employment of other counsel, and has delivered all papers and property to the client. See generally Harold v. State, 450 So.2d 910 (Fla. 5th DCA 1984). Does an indigent defendant deserve less? The Respondent has forced the "withdrawal" of the public defender without taking measures to avoid prejudice to the defendant from the sudden removal of his counsel on the eve of trial.

As Petitioners pointed out, Willie Reynolds has also been denied a jury trial although, at least arguably, he has a right to one. This is because gambling was chargable as a public nuisance at common law. Lee v. City of Miami, 121 Fla. 93, 99-103, 163 So. 486 (1935). The right to jury trial and the right to counsel cannot be equated. The right to a jury trial is not based upon the same criteria as the right to counsel. James v. Headley, 410 F.2d at 331-33. Petitioner Reynolds is not trained to research the law and will find it extremely difficult to present to the court an argument as to why he is entitled to a jury trial. If he is therefore denied his right to a jury trial, a further constitutional violation will have occurred.

As Petitioners have discussed, Respondent is interfering with and restricting the public defender's independent judgment in the defense of his client. See State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982) (state constitutionally obligated to respect the professional independence of the public defenders whom it engages; primary responsibility of

public defender to serve the undivided interests of his client); Graham v. State, 372 So.2d 1363 (Fla. 1979) (appointed counsel has professional responsibility to represent his client in any forum where necessary to protect his client's rights). Additionally, Respondent is interfering with the public defender's responsibility to act in accordance with the ethical standards set out in the Code of Professional Responsibility. Like any member of the Florida Bar, the public defender is required to exercise independent professional judgment on behalf of his clients (Canon 5) and to represent his clients competently (Canon 6). Obviously, he cannot abide by these canons if he is not permitted by Respondent to represent the clients on the charges in question.

Courts have stated on numerous occasions that defense counsel provides an extreme benefit and that a defendant is at a definite disadvantage when attempting to represent himself. See, e.g., Miller v. State, 11 F.L.W 738 (Fla. 5th DCA Mar. 27, 1986). This is supported by the requirement that a Faretta inquiry be held before permitting a defendant to represent himself. See Faretta v. California, 444 U.S. 806 (1975). The Respondent has not conducted such a hearing in either case and no waiver of the right to counsel has been made by either defendant.

Rule 3.111(d) of the Florida Rules of Criminal Procedure has codified the United States Supreme Court's holding in Faretta v. California, 444 U.S. 806 (1975) (right of self-representation constitutionally guaranteed but defendant must "knowingly and intelligently" relinquish benefits of counsel).

Subsequent to Faretta, Florida courts have held that, to ensure that a defendant's decision to represent himself is knowingly and intelligently made, the trial court must make an inquiry on the record to demonstate the defendant's understanding and appreciation of the seriousness of the charges and his capacity for self-representation. Miller v. State, 11 F.L.W 738 (Fla. 5th DCA Mar. 27, 1986) (reversed because solvent defendant who was denied appointment of counsel was permitted to represent himself without Faretta inquiry); Morgano v. State, 439 So.2d 924 (Fla. 2d DCA 1983) (even though defendant was solvent, trial court erred in allowing him to represent himself without making an appropriate Faretta inquiry).

In the cases at hand, the court denied counsel to the defendants, actually removing appointed counsel in one instance, mandating that petitioners /defendants proceed pro se (both were found to be insolvent), without inquiring as to their ability to represent themselves as required under Faretta. In the event, that the petitioners/defendants are tried without counsel and found guilty as a result of the denial of their right to counsel, such error would not be found harmless. The United States Supreme Court has held that cases involving the right of self-representation are not amenable to "harmless error" analysis. McKaskle v. Wiggins, 465 U.S. 168 (1984).

CONCLUSION

Petitioners are not asking that Respondent appoint the public defender to represent Petitioner Gayoso on the DUI charge. Instead they request that the public defender be allowed to exercise his independent judgment to represent the defendant as to the DUI charge without being appointed. As to Petitioner Reynolds, Petitioner seeks to have his involuntary "discharge" rescinded, so that he can finish a case that he has spent four months preparing for trial. Petitioner Allen believes that his office would be ethically remiss if it allowed either of these defendants to proceed to trial without counsel. In either case, the defendant would suffer serious consequences resulting from denial of his constitutional right to effective assistance of counsel. For the above reasons, therefore, we join the Petitioners, as amicus curiae, in requesting that the Petitions for Writ of Mandamus or, alternatively, Writ of Prohibition, be granted.

Respectfully Submitted,

PUBLIC DEFENDERS' ASSOCIATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by ~~U.S. Mail~~ Hand to Respondent Hal S. McClamma, County

Judge, Leon County Courthouse, Tallahassee, Florida; Michael E. Allen, Public Defender, Second Judicial Circuit, and P. Douglas Brinkmeyer, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida, 32302; Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; and to Honorable William N. Meggs, State Attorney, First Florida Bank Building, Tallahasee, Florida, this 9th day of May, 1986.

ELTON H. SCHWARZ