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IN THE SUPREME COURT OF FLORIDA

HONORABLE MICHAEL E. ALLEN, :
PUBLIC DEFENDER, SECOND :
JUDICIAL CIRCUIT, and :
VINCENT GAYOSO, :

Petitioners, :

v. :

HONORABLE HAL S. McCLAMMA, :
COUNTY JUDGE, IN AND FOR :
LEON COUNTY, :

Respondent. :

_____ :

FILED
CLERK SUPREME COURT
By Dubhie Causseay
Chief Deputy Clerk
CASE NO.

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

COME NOW the petitioners, by and through the undersigned, and move this Honorable Court to grant its writ of mandamus or writ of prohibition, pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100(a).

JURISDICTION OF THE COURT

This Court has jurisdiction, pursuant to Article V, Section 3(b)(2), Florida Constitution, to issue a writ of mandamus to the respondent county judge, who is a constitutional and state officer pursuant to Article V, Section 6, Florida Constitution and Section 34.021, Florida Statutes. This Court has jurisdiction to issue a writ of mandamus to aid petitioner Allen, who is a constitutional and state officer, Article V, Section 18, Florida Constitution, and Section 27.50, Florida Statutes, in the performance of his duties. State ex rel. Norris v. Chancey, 129 Fla. 194, 212-13, 176 So. 78 (1937):

[T]hey [the Civil Service Board of the City of Tampa] have the right to act as relators in bringing this mandamus proceeding, it appearing prima facie from the allegations that they came within the operation of the principle enunciated in Holland v. State, [23 Fla. 123, 1 So. 521 (1887)], to the effect that where a power or duty is imposed by law upon a board of officers, and to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, they may

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apply for same. They are also, under such allegations, "officially directly interested" within the meaning of those words as used in the [State ex rel. White v. MacGibbon [79 Fla. 132, 84 So. 91 (1920)]] case, supra.

This Court has jurisdiction to issue its writ of mandamus to compel a judge to observe court procedure. State ex rel. Dillman v. Tedder, 123 Fla. 188, 166 So. 590 (1936). This Court has jurisdiction to issue its writ of mandamus to compel a judge to perform a ministerial act. Wincor v. Turner, 215 So.2d 3 (Fla. 1968). This Court has jurisdiction to issue its writ of mandamus to enforce a constitutional right. State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936); Dickey v. Circuit Court, 200 So.2d 521 (Fla. 1967). Petitioners have no other adequate remedy at law. Costello v. Carlisle, 413 So.2d 834 (Fla. 1st DCA 1982).

In the alternative, this Court has jurisdiction to issue its writ of prohibition against the respondent county judge, who was acting in excess of his jurisdiction. English v. McCrary, 348 So.2d 293 (Fla. 1977). This Court has jurisdiction to issue its writ of prohibition to enforce a constitutional right. Sherrod v. Franza, 427 So.2d 161 (Fla. 1983); Westlake v. Miner, 460 So.2d 430 (Fla. 1st DCA 1984), approved, 478 So.2d 1066 (Fla. 1985). Petitioner Gayosa has no other adequate remedy at law and will suffer impending present injury. Gordon v. Savage, 383 So.2d 646 (Fla. 5th DCA 1980).

Finally, this Court has the sole jurisdiction to regulate the conduct of attorneys, Article V, Section 15, Florida Constitution, as well as the practice and procedure in the courts, Article V, Section 2(a), Florida Constitution.

STATEMENT OF THE FACTS

Petitioner Gayoso was arrested on February 14, 1986, at 2:05 a.m., in Leon County, and charged with driving under the influence [hereinafter referred to as DUI], in violation of Sections 316.193(1), (a), and 316.1931(1), Florida

Statutes (Appendix A). He was also arrested at the same time and charged with driving while license suspended or revoked [hereinafter referred to as DWLS], in violation of Section 322.34(1), Florida Statutes (Appendix B). DUI is a criminal traffic infraction, Section 318.17(3), Florida Statutes, punishable by not more than six months imprisonment for a first conviction. Section 316.193(2)(b)1, Florida Statutes. DWLS is a second degree misdemeanor, Section 322.34(1), Florida Statutes, punishable by not more than 60 days imprisonment. Section 775.082(4)(b), Florida Statutes.

At petitioner Gayoso's first appearance hearing on that date, he was adjudicated insolvent, and petitioner Allen, the duly elected Public Defender of the Second Judicial Circuit, was appointed to represent him on the DWLS charge, pursuant to Section 27.51(1)(b), Florida Statutes. Respondent entered an order of no imprisonment [hereinafter referred to as ONI] for the DUI charge (Appendix C). That statute, as well as Florida Rule of Criminal Procedure 3.111(b)(1), allows the court to refrain from appointing the public defender and enter an ONI if the court does not intend to impose a jail sentence upon conviction.

On February 25, 1986, petitioner Allen, through Assistant Public Defender Phil Patterson, filed a motion to consolidate the charges for trial (Appendix D). At a hearing on March 6, 1986, respondent granted the motion to consolidate but stated that petitioner Allen would be required to represent petitioner Gayoso on the DWLS charge at the consolidated trial, but would be prohibited from representing petitioner Gayoso on the DUI charge at the consolidated trial, and would be prohibited from advising petitioner Gayoso or otherwise assisting his defense to the DUI charge (Appendix E).

On March 24, 1986, petitioner Allen filed a motion for clarification, to determine whether respondent was forbidding

petitioner Allen from assisting petitioner Gayoso in the DUI portion of the trial (Appendix F). In a terse order dated March 26, 1986, respondent found that the order needed no clarification because petitioner Allen had accurately stated respondent's position (Appendix G).

NATURE OF RELIEF SOUGHT

Petitioner Allen seeks the aid of this Court in granting its writ of prohibition or mandamus to require respondent to allow petitioner Allen to appear at trial to defend petitioner Gayoso on the DUI charge as well as on the DWLS charge. Without the aid of this Court, petitioner Gayoso will be required to represent himself on the DUI charge and petitioner Allen will be precluded from tendering any advice or counsel to petitioner Gayoso during the portion of the trial relating to the DUI charge.

ARGUMENT IN SUPPORT OF THE WRIT

It is clear that respondent acted in accordance with established law when he appointed petitioner Allen to represent petitioner Gayoso on the DWLS charge, because an indigent defendant has the constitutional right to appointed counsel when a jail sentence is contemplated or imposed upon conviction. Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979). It is likewise clear that respondent acted contrary to law when he barred petitioner Allen from participating in petitioner Gayoso's DUI trial solely because:

[W]hat the public defender does on his time is his business but this Court has not appointed him to expend taxpayers money in case 86-3788.

(Appendix G).

Respondent has ignored this Court's decision in State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982), which petitioners submit is controlling authority in this matter. This case, submitted to respondent in petitioner Allen's motion for clarification (Appendix F), further defines the role of the public defender and his authority to represent an indigent defendant in a matter to which he was not directly appointed. In Smith, the Miami public defender was appointed to represent a juvenile in a Baker Act proceeding. After that matter was concluded, the public defender filed a class action lawsuit in federal court on behalf of the juvenile and others, pursuant to 42 USC § 1983. The attorney general challenged the public defender's authority to represent the members of the class in federal court whom he had not been appointed to represent in state court. This Court agreed with the attorney general and held that the public defender could not represent the class. However, this Court also held that the public defender could represent, in federal court, the juvenile whom he had been appointed to represent in state court, as a matter of professional responsibility:

The state is constitutionally obliged to respect the professional independence of the public defenders whom it engages. The decision in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), established the right of state criminal defendants to the "[q]uiding hand of counsel at every step of the proceedings against [them]." *Id.* at 345, 83 S.Ct. at 797 (quoting from Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932)).

The United States Supreme Court opinion in Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), concisely summarizes this Court's view concerning the primary purpose of the public defender. Quoting from Ferri v. Ackerman, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979), the Court agreed that

His [the public defender's] principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the

effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.

102 S.Ct. at 450 n. 8 (emphasis supplied).

Id. at 533.

In Smith, this Court founded its holding upon its prior decision in Graham v. State, 372 So.2d 1363 (Fla. 1979), in which this Court held that counsel, having been appointed in state court, had authority to represent a client in federal court on post conviction proceedings, even though he could not be expressly appointed by a state judge for that purpose. Again, this Court made reference to counsel's professional responsibility in representing his client, in any forum, where necessary to protect his client's rights.

In the instant case, this same professional responsibility has motivated petitioner Allen to seek to represent petitioner Gayoso in the DUI trial. Since petitioner Allen has express statutory authority to represent petitioner Gayoso on the DWLS charge, Graham and Smith permit him to represent petitioner Gayoso on the DUI charge, as well.

This limited autonomy on the part of the public defender to decide to represent clients, in a forum other than that in which the public defender has been expressly appointed, is recognized in other state cases, in addition to State ex rel. Smith v. Brummer. For example, in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981), the public defender represented the petitioner before this Court in a mandamus action seeking the right to parole. In Florida Parole and Probation Commission v. Alby, 400 So.2d 864 (Fla. 4th DCA 1981), the court specifically held that the public defender had authority to file a habeas corpus petition. In Roberson v. Florida Parole and Probation Commission, 407 So.2d 1044 (Fla. 3d DCA 1981), quashed on other grounds, 444

So.2d 917 (Fla. 1983), the public defender represented the prisoner in an administrative appeal. The public defender has also represented clients in proceedings such as prohibition, Sherrod v. Franza, supra, and common law certiorari, Roberts v. State, 345 So.2d 837 (Fla. 3d DCA 1977) and Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976). Finally, the First District in Graham v. Vann, 394 So.2d 176 (Fla. 1st DCA 1981) rejected the view that the public defender's responsibilities are limited solely by statute, and in two companion cases, implicitly allowed the public defender to institute a complaint for declaratory relief, a petition for injunctive relief, and a petition for writ of mandamus. Graham v. Vann, 394 So.2d 178 (Fla. 1st DCA 1981) and Graham v. Vann, 394 So.2d 180 (Fla. 1st DCA 1981).

In addition to this Court's opinion in State ex rel. Smith v. Brummer, supra, the right of the public defender to take clients into federal court in order to protect their rights has been equally recognized by the federal courts. See, e.g., Pugh v. Rainwater, 355 F.Supp. 1286 (S.D. Fla. 1973), affirmed in part, 483 F.2d 778 (5th Cir. 1973), affirmed in part sub nom. Gerstein v. Pugh, 420 U.S. 103 (1975) [suit for declaratory and injunctive relief leading to major decision on standards for pretrial detention]; and Ackis v. Purdy, 322 F.Supp. 38 (S.D. Fla. 1970) [suit for declaratory and injunctive relief regarding use of master bond schedule for pretrial release].


The common theme of these cases -- in addition to the realization that if the public defender does not undertake the case, nobody else will - is that once the public defender is appointed to represent someone he is required to represent, his discretion in choosing the means by which this representation is to be carried out should not be judicially limited. These cases also rest upon the

assumption, present in the instant case, that the public defender is acting in good faith and in accordance with recognized ethical principles. See, e.g., Babb v. Edwards, 412 So.2d 859 (Fla. 1982) and Section 27.53(3), Florida Statutes [once public defender has certified a conflict of interest, the court has no alternative but to appoint substitute counsel]; Code of Professional Responsibility, Canon 5 [a lawyer should exercise independent professional judgment on behalf of a client], Canon 6 [a lawyer should represent a client competently], and Canon 7 [a lawyer should represent a client zealously within the bounds of the law]. It is axiomatic that the establishment of the duty to represent a client necessarily carries with it the inherent power to initiate and engage in all representation necessary to the complete exercise of this duty, which is not in conflict with any other law or public policy.

In summary, then, petitioners have demonstrated that respondent's actions are contrary to law and to accepted notions of the public defender's professional responsibility. This Court should grant its writ to allow petitioner Allen to exercise his professional judgment on behalf of petitioner Gayoso.

Respectfully submitted,*

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT


P. DOUGLAS BRINKMEYER
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Respondent Hal S. McClamma, County Judge, Leon County Courthouse, Tallahassee, Florida; Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; and to Honorable William N. Meggs, State Attorney, First Florida Bank Building, Tallahassee, Florida, this 8 day of April, 1986.


P. DOUGLAS BRINKMEYER