IN THE SUPREME COURT OF FLORIDA

RICHARD RAMSEY,

Petitioner,

v. CASE NO. 70,719

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF THE RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

OF COUNSEL FOR RESPONDENT

/tms

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

FLORIDA RULES OF CRIMINAL PROCEDURE:

FLORIDA STATUTES :

PRELIMINARY STATEMENT

RICHARD RAMSEY will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

On June 24, 1985, co-defendants, Raymond Lloyd Bull and Richard Lynn Ramsey were charged in the Circuit Court of the Tenth Judicial Circuit with escape, in violation of **Florida Statute S944.40 (1985)** (R 3).

After trial by jury on November 18 - 19, 1985, both defendants were found guilty as charged. (R 423). They were adjudicated guilty, and at the time of sentencing, the public defender submitted affidavits for costs. (R 446). The trial court, offered the defendant thirty (30) days in which to request a hearing to oppose the amount of the public defender lien. No such hearing was every requested by the defendant.

Timely notices of appeal to the Second District Court of Appeal were filed on January 10, 1986, and January 15, 1986 respectively. (R 451). The public defender for the Tenth Judicial Circuit was appointed to represent both defendants in the prosecution of their appeal. (R 455).

In an opinion issued by the Second District Court of Appeal on May 20, 1987, the court of appeals struck the court costs imposed, but found that the appellant had waived objections to the imposition of a public defender lien by signing affidavits waiving such notice and hearing. The court found no merit in any of the other issues raised on appeal.

Timely notices of appeal to the Supreme Court of Florida alleging conflict jurisdiction were mailed on June 9, 1987. On August 27, 1987, this Honorable Court accepted jurisdiction.

STATEMENT OF THE FACTS

Respondent accepts petitioner's statement of the facts with several exceptions as follows:

Petitioner alleges in his Statement of the Facts that the petitioner was well aware of the guards, fences, barbed wire, dogs, walkie talkies, etc. It should be made clear that petitioners were well aware of these at the time of trial. However, there was no evidence to show that they were aware of these things on the day of their escape. It should further be noted that petitioner states in his Statement of the Facts that "they in fact surrendered shortly thereafter." The record is absolutely silent, and there is no evidence whatsoever to show that the appellants surrendered. There is only evidence below, that Officer Cool drove some two hundred feet beyond the outer perimeter of the prison grounds into a sewage treatment plant and headed the appellant off and captured him. (R 276 - 277). It should further be noted that petitioner states in his Statement of the Facts that the events sub judice occurred at dusk. Respondent would submit that the outer perimeter of the prison compound is surrounded by lamps which come on automatically at dark and illuminate the perimeter of the prison compound as if it were daylight (R 281), and that at the time of the escape, these lights were just beginning to come on. (R 281).

SUMMARY OF THE ARGUMENT

Defendants in Polk County are not improperly required to waive the rights to notice and a hearing on the imposition of public defender fees as the price of obtaining the services of a public defender. Neither the trial court below (who in accord with **Florida Rule of Criminal Procedure 3.701(d)** denied them an opportunity for such a hearing, nor is it conceivable that any court anywhere within this state would deny an indigent, court appointed counsel for failing to sign either an affidavit of indigency, after the court found the defendant to be indigent, or for failing to sign any waiver of notice and hearing for the imposition of a public defender lien.

There is no conflict in the representation of a defendant by a public defender at the time an affidavit for public defender fees are submitted to the court. The public defender does not collect these fees, nor does the public defender sue his former client for these fees.

ARGUMENT

ISSUE I

WHETHER PETITIONER WAS DENIED HIS DUE PROCESS AND STATUTORY RIGHTS TO NOTICE OF, A HEARING ON, AND DISINTERESTED LEGAL REPRESENTATION DURING THE IMPOSITION OF A PUBLIC DEFENDER LIEN AGAINST HIM.

A.

On June 6, 1985, at his first appearance hearing pursuant to an obvious finding by the court that petitioner was insolvent, a public defender was appointed and the petitioner signed an affidavit of insolvency. (R 1, 2). A provision of this affidavit authorized the trial court to set a fee for the services of the public defender and to impose a lien against the petitioner without any notice of a hearing. (R 2).

At the time of sentencing, Ramsey's public defender submitted an affidavit to the trial court for $750. Mr. Bull's public defender, at the same time, submitted an affidavit in the amount of $1,000. (R 442). The trial court stated that neither Mr. Bull nor Mr. Ramsey had had an opportunity to consider whether these amounts were fair (R 443) and, therefore, the court stated that it was imposing the liens, but gave the defendants thirty days to request a hearing on the fairness of these respective amounts. (R 443). The record does not reflect that a hearing was requested. It is apparent then that notwithstanding any waiver either petitioner signed at their first appearances, the trial court in this case granted both petitioners an opportunity for a hearing. This was done in accord with **Florida Rule of**

Criminal Procedure 3.701(d), and therefore, obviously approved in form and procedure by this Court.

On direct appeal, petitioner raised the issue of notice, hearing and disinterested legal representation at the assessment of a public defender fee as required by Jenkins v. State, 444 So.2d 947 (Fla. 1984). On direct appeal, respondent (appellant below) responded that it was somewhat scandalous to allow a public defender to submit an affidavit for a public defender's fee without requesting the court for an opportunity to discuss with the defendant as to whether or not he actually thought the amount was fair, which would have provided the hearing required, and then on appeal to have another public defender attack this as denial of a hearing. In response, the public defender admitted scandal. The Second District Court of Appeal, in its issued opinion chose to ignore the admitted scandalous behavior, and held that the waiver in the affidavit of insolvency dispensed with the notice and hearing requirements of **§27.56(7) Florida Statutes.** Ramsey v. State, 507 So.2d 742, 743 (Fla. 2 DCA 1987); **Bull** v. State, 507 So.2d 744, 745 (Fla. 2 DCA 1987).

B.

Petitioner asserts that as a predicate for obtaining court appointed counsel, the petitioner had to sign this waiver of notice and hearing. In support of this assertion, petitioner cites Gryca v. State, 315 So.2d 221 (Fla. 1 DCA 1975) and McGeorge v. State, 386 So.2d 29 (Fla. 5 DCA 1980). Respondent disagrees. In Gryca v. State, supra, the defedant, in order to

even obtain a public defender, had to actually execute a lien as security for the debt created by the services rendered. It is true that in Gryca the defendant also executed a waiver of any notice of proceedings where the amount of this lien would be fixed as well as to any notice of the actual filing of the lien. However, it cannot be satisfactorily argued that had the respondent refused to sign the affidavit of indigency at his first appearance in the case sub judice, that the court would have denied him a public defender. And certainly, unlike Gryca, supra, the petitioner herein did not have to execute any lien as security for a debt created by the public defender's services. It should also be noted that the dissent in Gryca said that the record reflects the defendant knowingly and intelligently waived her rights and in no way shows that she was in any way forced to abandon those rights. Id. at 223, 224.

This Court in Jenkins v. State, 444 So.2d 947 (Fla. 1984), did not invalidate the imposition of a public defender lien, but rather required that adequate notice to the defendant that the county was seeking these costs, and an opportunity for the defendant to be heard on the issue. Id. at 950. Practical matters as to how often such liens are actually imposed or collected aside, Jenkins clearly does not prohibit the lien, it merely instructs that the defendant be given notice that the county is seeking recovery of the money expended on the defendant's behalf, with an opportunity for the defendant to be heard on the matter. Petitioner was given such notice at the time he signed his affidavit

of insolvency in accord with **Florida Rule of Criminal Procedure 3.701(d).** He was thereafter given an opportunity by the trial court to be heard. (R **443).** The fact that he failed to avail himself of this opportunity is petitioner's personal waiver. In McGeorge v. State, supra, the court specifically found that notice and an opportunity to be heard in compliance with **Florida Statute 27.56(7)** was not afforded the defendant. It was the particular probation order in McGeorge that offended because it required waiver of notice and hearing in order to obtain a public defender. This did not require finding that **Section 27.56(7)** was unconstitutional. The court held that a new probation order would have to be drafted that did not deprive the defendant of his statutory rights. Again, there is nothing in the record to show that the public defender would not have been appointed had petitioner failed to sign this waiver; Nor did the trial court sub judice deprive petitioner of notice and an opportunity to be heard. If the instant Polk County Order is offensive, then, as in McGeorge, new ones should be drafted; a finding that the statute is unconstitutional because of a single offensive form however, is inappropriate.

C.

Petitioner then asserts that the instant "waiver" was invalid because the signing of a boilerplate statement to the effect that a defendant is knowingly waiving his rights does not discharge the governments burden. In support of this assertion, appellant cites Jordan v. State, **334** So.2d 589, 592 (Fla. 1976)

and United States v. Hayes, 385 F.2d 375, 377 (4th Cir.) and Fields v. State, 402 So.2d 46 (Fla. 1 DCA 1981). Respondent would urge that these cases are not only dissimilar to the case sub judice, but they each clearly hold that constitutional rights can, in fact, be waived. In Jordan v. State, supra, the court said:

> "Decisions rendered in this jurisdiction lead us to the conclusion that waiver of Miranda rights need not be by affirmative response or express waiver once the warning has been given."

Id. at 592 (citations omitted)

A brief look at the plea colloquoy sub judice (R 443) where appellant was given thirty days to object to the assessment of the public defender fee and thereafter, requested no hearing, would clearly manifest a waiver of such hearing.

In Fields v. State, supra, the court held that the state bears the burden of showing a Miranda waiver was voluntary and intelligent. This is so because the state is going to use the defendant's words to convict him and is far different than what the public defender alleges is the state's burden in showing that petitioner waived his right to a hearing regarding the assessment of a public defender fee. In United States v. Hayes, supra, the court held that there is a heavy burden on the state to show an accused waive his privilege against self-incrimination.

In his brief on the merits, petitioner states "indeed that this waiver was made intelligently with full awareness of its consequences is hard to imagine." (See Brief of the Petitioner

on the Merits, page eight) It is obvious then that counsel for petitioner has no idea whether petitioner's waiver was voluntarily and intelligently made or not. Thereafter, petitioner asserts that "this waiver was the functional equivalent of giving the state a blank check to impose any amount it wanted without telling the defendant about it." (See Brief of Petitioner on the Merits, page eight) Respondent would urge that it is the public defender who fills in the amount on the check, not the state.

D.

Respondent attaches the affidavits of indigency from Collier and Hillsborough Counties as an appendix to his brief; and, although the contents of those affidavits clearly state otherwise, petitioner asserts that these affidavits all "suggest that whether the defendant can or will be able to pay is an irrelevant consideration at the hearing." (See Brief of Petitioner on the Merits, page nine) This is conclusory and without any basis. Excerpts from the affidavits sub judice and the two attached in petitioner's appendix are as follows:

> A. Polk County; (this excerpt is found at R 1 and 2 and was signed by the petitioner).
>
> I, the defendant, in the case before the court, having been duly sworn by the judge of this Court, swear the following statements to be true:
>
> (i) I desire the assistance of an attorney in this proceeding, but I am without money or means with which to

hire one. I therefore request the court to appoint an attorney to represent me in my defense.

(ii) I further authorize this Court to set the fee for the services of my attorney and impose a lien against me for this amount without any notice of a hearing for such purpose. If at any time in the future I become financially able to hire private counsel, I will promptly advise the court.

B. Hillsborough County: (See Appendix Four attached to Petitioner's Brief on the Merits)

I, _____, hereby consent to a lien against all of my real or personal property presently owned or acquired, in favor of Hillsborough County, Florida for an amount which shall constitute the reasonable value of the legal services rendered to me by the Public Defender of the Thirteenth Judicial Circuit. I further understand that I shall have the opportunity to be heard, and offer objections to the determination of the value of services of the public defender and costs, at the time of the final disposition of my case, and to be represented by counsel at such hearing.

_____
Signature of Affiant.

C. Collier County; (Appendix A3 to Petitioner's Brief on the Merits and initialed "do not waive" by defendant)

I understand that pursuant to 27.56(7), Florida Statutes, I have the right to a hearing as to what, if any, attorneys' fees and costs will be assessed against me for services rendered if I am found guilty or enter a plea of guilty or nolo contendere to any criminal charges, and that I may waive notice of and the right to appear at said hearing and that the failure by me to execute said waiver will

not effect my ability or my right to be represented by the Office of the Public Defender.

Understanding the above, I hereby state that: I do _____ do not_____ waive notice of and right to appear at the hearing where a judge can and will assess a reasonable fee for the services of the public defender or appointed counsel in this matter, if I am found guilty.

_____
Affiant.

Petitioner asserts that all of these affidavits contained boiler-plate language which is insufficient as a valid waiver. Respondent would urge that the Collier County affidavit and the Hillsborough County affidavit clearly neither deprive an accused the opportunity for notice and a hearing on the assessment, nor do they predicate obtaining a public defender on the signing of the waiver. In fact, the affidavit under consideration sub judice, the Polk County affidavit also does not predicate appointment of the public defender upon signing the affidavit. Petitioner asserts that all three of these affidavits require the defendant to sign as a price of getting court appointed counsel. (Brief of Petitioner on the Merits, page ten) In support of this contention, petitioner cites Fuller v. Oregon, **417** U.S. **40 (1974).** Although an equal protection case, in Fuller v. Oregon, the Supreme Court upheld a statute that allowed repayment of a public defender fee as a condition of probation. Repayment of this fee was not mandatory, unless the court found that the defendant was or would be able to pay the fee. No requirement to pay could be imposed at sentencing if there was a likelihood that

the defendant's indigency would not end, and any defendant could petition the court to relieve him of the obligation of paying this public defender fee. Id. at 650. In Fuller v. Oregon, supra the court stated:

> The argument is not that the legal representation actually provided in this case was ineffective or insufficient. Nor does the petitioner claim that the fees and expenses he may have to repay constitute unreasonable compensation for the defense provided him. Rather, he asserts that a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus "chill" his constitutional right to counsel. . . . We have concluded that this reasoning is wide of the constitutional mark.

Id. at **417** U.S. 51

and then,

> "The fact that an indigent that accepts state appointed representation knowns that he might some day be required to repay the costs of these services in no way effect his eligibility to obtain counsel.

Id. at **417** U.S. 52

E.

Petitioner next asserts that he did not recieve the notice required by Section 27.56(7) **Fla.** Stat. and Jenkins v. State, supra. Respondent would urge that he was given notice at sentencing and an opportunity to object by the trial court. (R **443).** Petitioner next urges that he did not receive the required hearing. Respondent would urge that petitioner was given an opportunity for this hearing and never exercised that opportunity. In

support of his contentions, petitioner cites Cliburn v. State, (Fla. 3d DCA, Aug. 11, 1987) [12 F.L.W. 19441. There the trial court assessed costs and allowed the defendant to request a hearing thereafter. The Third District Court of Appeal found this violated Jenkins. However, respondent would urge it is, in fact, in accord with **Florida Rule of Criminal Procedure 3.701(d).** Petitioner urges that this procedure under **3.720(d)** is inefficient and constitutes bad policy. Petitioner then asserts that "court dockets should not be clogged by and defendants should not have to wait for hearings on public defender liens when these hearings can be held much more efficiently at the sentencing hearing." (See Petitioner's Brief on the Merits, page eleven) Respondent is at a loss to adequately address this assertion by petitioner. First, petitioner says that notice of the imposition of the lien at sentencing as in the case sub judice is unlawful, and thereafter suggests that that's exactly how it should be done. It should be noted that the committee note to the **1980** amendment of **3.720** states:

> Modification of the Rule requires a trial judge to adequately inform a defendant of the imposition of lien for the public defender's services. A uniform procedure for scheduling hearings to contest liens would reduce the number of post-sentence petitions from incarcerated defendants at times remote from sentencing. The procedure is designed to complete all lien requirements established by §27.56, Florida Statutes (1979), before defendants are removed from jurisdiction of the trial court.

Therefore, this rule is in accord with precisely what petitioner suggests. Petitioner then asserts that "defendants must

unnecessarily delay their appeals if they wish to contest the fees, since the trial court does not have jurisdiction to hold the hearing once the notice of appeal is filed." (See Brief of Petitioner on the Merits, pages eleven and twelve) Respondent would assert that that the trial court has concurrent jurisdiction with the appellate court until the record is transmitted. **Florida Rule of Appellate Procedure 9.600(a),** and that subsection (b) of this appellate provision would not impede the progression of a defendant's appeal.

F.

Citing Graham v. Murrell, 462 So.2d **34** (Fla. 1 DCA **1984)** and Baran v. State, **381** So.2d **323** (Fla. 5th DCA 1980), petitioner asserts that it is unethical for the public defender to represent a client and at the same time participate in the imposition of a public defender fee against that client and asserts that **27.56 (1)** is unconstitutional. First, respondent would urge that Baran v. State, supra was misread by the petitioner. Baran prohibits a lawyer from the same office that provided evidence to convict the defendant from thereafter representing that defendant at a probation revocation hearing for failure to pay a public defender fee. This case stands for no proposition that would place a public defender in violation of the rules of professional responsibility. The court in Graham v. Murrell, supra, found **27.56(1)(a)** unconstitutional because it regulated a procedure for attorneys without Surpeme Court approval, and found it thrust the public defender into a dilemma when it required the public defender to

assess costs and attorneys' fees against the client. Respondent would assert that this is no different than a private attorney sending his client a bill, or even suing his client for a fee. In fact, as stated earlier in this brief, the indebtedness is not to the public defender. Pursuant to **27.56(4), Florida Statutes** the debt is owed to the county, and it is the Board of County Commissioners that enforces and collects the debt owed. Subsection 4 also allows a court to remit all or part of the amount owed if it appears that manifest hardship would be imposed by enforcement. Respondent would therefore urge that the court in Graham v. Murrell, supra was mistaken in its interpretation of **27.56(1)(a). Florida Statute 27.56(2)** advises that funds collected via **27.56** are remitted to the county and used to defray expenses incurred by the county in defense of criminal prosecutions. "All judgments entered pursuant to the provisions of this act shall be in the name of the county in which the judgment was rendered." Therefore, it is the county through its attorney that collects these fees; not the public defender, and there is no conflict whatsoever either real or imagined. Petitioner appears to be confusing the submission of an affidavit for costs with the enforcement of a lien. Clearly, he is mixing apples and oranges.

G.

Petitioner next urges that "public defenders might thus want to request arbitrarily high fees and to violate their clients' due process rights with regard to notice and hearings" because the county uses the monies collected from public defenders' fee

to defray expenses incurred by the county in defense of criminal prosecutions. (See Petitioner's Brief on the Merits, page thirteen) Pursuant to **Florida Statute 27.5301,** salaries of the public defenders are paid by the state as provided in the General Appropriations Act. Therefore, no matter how much a public defender may or may not submit in the way of an affidavit for costs, his salary would be uneffected thereby, whether the defendant pays the amount or not. To be sure, **Florida Statute 27.54** provides that the county will provide the public defender with office space, utilitites, custodial services, etc. However, that statutory provision provides that the county cannot provide less than the amount provided in the prior fiscal year (no matter how much was or was not collected from indigents) and that the office space and utilities must meet the standards promulgated by the Department of General Services and does not advise that either the space or conditions are contingent on how much was or was not collected from indigent clients. **Florida Statute 27.53(1)** advises that the elected public defender establishes the number of assistant public defenders he needs and appropriations are made therefore. Subsection 4 provides that these appropriations are determined by a funding formula. It is therefore obvious that no matter how much is or is not collected from the public defender's clients, his working conditions and/or salary will not be adversely effected thereby.

H.

In State v. Williams, 343 So.2d 35 (Fla. 1977), this Court upheld the constitutionality of this statute. Although Williams addressed an equal protection issue, it can only be assumed that this Court in its review of the statute, and after deleting the offensive portion, id. at 38, found no other constitutional infirmities. In DiBartolomeo v. State, 450 So.2d 925 (4th DCA 1984), the Court found that the denial of a court appointed attorney could not be based on the defendant's failure to submit an affidavit of indigency with the public defenders office after being twice instructed by the court to do ***so.*** Therefore, contrary to what petitioner asserts, that appointment of a public defender is predicated upon signing such an affidavit, clearly is not ***so.***

In Enrique v. State, 408 So.2d 635 (3d DCA 1982), the court held "it is axiomatic that an accused is entitled to counsel at every critical stage of a criminal proceeding." Id. at 637 (citations omitted). Here, the court determined that the right to counsel is not dependent on the defendant's request. (citations omitted). The statutory affidavit of indigency need only be filed under the trial court's request after it has first advised the accused of his rights to counsel. Id. at 639. Again, respondent would urge it is therefore obvious that signing or refusing to sign the affidavit of indigency is not a predicate to obtaining court appointed counsel.

In Robbins v. State, 318 So.2d 472 (4th DCA 1975), the court

found that the mere fact that the defendant was ordered to pay a public defender's fee as a condition of probation and failed to do so did not raise any conflict of interest between the public defender's office and the defendant which would preclude the public defender from representing the defendant in the probation revocation hearing. The court said:

> "To begin with, a defendant represented by a public defender does not owe any money to the public defender; he owes it to the state. Section 27.56(1), Florida Statutes (1973). It is true that section 27.56(1) provides that liens for the services of the public defender 'shall be enforced on behalf of the state by the public defender'; however, it is also true that there was no showing in this case that the public defender's officer which was representing appellant made any attempt to enforce any lien against appellant under section 27.56(1), or that it sought to collect any debt from appellant under section 27.56 (2)(c) Florida Statutes (1973).

It is clear that this statutory scheme in its present day state deletes those portions cited above which provide that the public defender would enforce this lien on behalf of the state. However, the reasoning of Robbins is clear, and respondent urges placing that without this responsibility onto the public defender, there is no conflict.

ISSUE II

WHETHER THE COURT ERRED BY REFUSING TO ADMIT EVIDENCE RELEVANT TO THE CO-DEFENDANT'S MOTIVE FOR LEAVING THE PRISON.

Appellant is, as he did on direct appeal, confusing the issue of intent with the issue of defense of necessity. In his brief on the merits before this Court, he alleges that the state was allowed to introduce evidence that Bull was serving twenty years in prison while Ramsey was serving seven years. Petitioner then asserts his conclusion of the purpose of this evidence: to support an inference that someone with a long sentence has a greater motive for escaping than someone with a short sentence. (See Brief of Petitioner on the Merits, page seventeen) Respondent would urge that it was encumbent upon the state to show a valid judgment and sentence, and that both Bull and Ramsey were lawfully confined to prison before the state could prove escape beyond a reasonable doubt. At trial, the state introduced no attack on the defendant's motive.

Petitioner rests merely on his conclusion that the state introduced the length of the petitioner's sentence in order to support an inference that petitioner has clearly invented herein. His entire argument then rests on the invented conclusion.

Respondent would adopt, and incorporate by reference in response to this issue its argument in Issue I contained in its brief on direct appeal.

PAGE(S) MISSING

CONCLUSION

Based on the above stated facts, arguments and authorities, Respondent would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Stephen Krosschell, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 8th day of October, 1987.

OF COUNSEL FOR RESPONDENT.