IN THE SUPREME COURT OF FLORIDA

RAYMOND BULL

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

Case No. *70,723*

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEPHEN KROSSCHELL
ASSISTANT PUBLIC DEFENDER

Hall of Justice Building
P.O. Box *1640*
Bartow, FL *33830*
(813) 533-1184;0931

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

On June *24, 1985,* Codefendants, RAYMOND LLOYD BULL and RICHARD LYNN RAMSEY were charged in the Circuit Court of the Tenth Judicial Circuit with escape, in violation of *5944.40* Florida Statutes *(1985). (R3)*

At a jury trial on November *15-19, 1985,* Bull and Ramsey were found guilty as charged. (R422) They were adjudged guilty, and costs and public defender liens were imposed on December *17, 1985.* (R447) Bull and Ramsey were sentenced to *15* and 10 years in prison respectively. (R441)

Timely notices of appeal to the Second District Court of Appeal were filed on January 10, 1986 and January 15, 1986, respectively. (R452) The Public Defender for the Tenth Judicial Circuit was appointed to handle these appeals. *(R456)*

In opinions issued on May 20, *1987,* the second district struck the court costs but found that the appellants had waived objections to the public defender liens by signing affidavits of indigency. The court found no merit in the other issues raised on appeal.

Timely notices of appeal to the Supreme Court of Florida were mailed on June 9, 1987. The Supreme Court accepted jurisdiction on September 25, 1987.

STATEMENT OF THE FACTS

On June 5, 1985, (R323) in the Polk Correctional Institution, (PCI) Codefendant Ramsey was serving two consecutive sentences totaling 20 years which started on July 11, 1983, (R292,299) while Codefendant Bull was serving a seven year sentence which started on March 14, 1983. (R292) Before coming to PCI, Bull had been approved to go to a road camp rather than a prison like PCI. (R324) Consequently, upon arrival at PCI, Bull asked for a transfer but to no avail. (R325,329) Ramsey also asked for a transfer, with the same effect. (R344)

Bull and Ramsey testified that they ran for the fences on June 5 around 8:00 p.m. in order to get a transfer fron PCI. (R330, 332,346) They were well aware of the guards, fences, barbed wire, dogs, walkie talkies, etc. (R331,344-345) and figured they would get caught. (R332,347) When they got over the first fence, however, the security had apparently not been alerted yet. (R333,347) Waiting might have gotten them only disciplinary action and not a transfer, so they went over the second fence as well. (R332)

Bull and Ramsey had already triggered an alarm by going over the first fence. (R204) They were seen running from the second fence by several corrections officers. (R232,235,239,275) One officer shouted at them to stop, but they kept on running. (R245) They saw (but did not hear) the officer and thought she was going to shoot them. (R336,350) They wanted to get into the clear and further ahead so that they could safely surrender. (R336) They put up their hands and surrendered shortly thereafter to another officer. (P.277, 337,352) This officer said, however, that they did not surrender until after he had pulled out his gun and ordered them to stop. (R277)

Bull and Ramsey testified that their only intent was to get transferred, not to escape lawful confinement. (R338,353)

Bull and Ramsey were wearing sweatshirts and gloves. (R209-210,278) They had previously thrown away their innate I.D. cards. (R283) When caught, they did not have any food, money, medical supplies, tools, blankets, etc. in their possession. (R221-222)

These events occurred at dusk when the guards were announcing a head count. (R208,224) After this count, imates were returned to their dormitories and could not leave without an escorting corrections officer. (R209,226) At the time of the alleged escape, the lights surrounding the prison compound were just starting to come on. (R280) The lights illuminated the compound as if it were daylight. (R280)

SUMMARY OF TEE ARGUMENT

I. Defendants in Polk County are improperly required to waive their rights to notice and hearing on the imposition of public defender fees, as the price of obtaining the services of the public defender. In consequence, the due process rights of notice and hearing will never have any effect in Polk County, because everyone represented by the public defender must waive these rights. The State also cannot show that these waivers are knowing, intelligent, and voluntary. Boilerplate waivers printed on a standard form are insufficient to sustain the government's burden. Polk County defendants are also improperly required to consent to these fees, in derogation of their right to show that the fees would cause manifest hardships and that they cannot possibly be paid.

Petitioner did not in fact receive the notice and hearing required by due process. Although, in conformity with the procedural rules, petitioner was given 30 days to ask for a hearing, this procedure was inconsistent with the statutory hearing requirement and the case law.

Petitioner was not represented by disinterested counsel when the lien was imposed. The public defender could not ethically act t the same time both for the state (by submitting the fee request) and his client (by making sure that correct procedures were followed). Moreover, the public defender had an interest in having the fees assessed, since the fees would be used by the county to defray his expenses. Florida's fee recoupment system forces public defenders into this conflict of interest and consequently is unconstitutional.

II. The court erred by excluding evidence which showed that petitioner's intent in leaving the prison was not to escape lawful confinement but merely to get a transfer. This evidence related to petitioner's motive and as such was relevant and not prejudicial. This evidence certainly should have been admitted when the State opened the door by attacking petitioner's motive for leaving the prison.

ARGUMENT

ISSUE I

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, petitioner signed an affidavit of insolvency, which permitted him to obtain the assistance of the public defender. (R1-2) As part of this affidavit, petitioner authorized the trial court to set a fee for the services of his attorney and to impose a lien against him for this amount without any notice of a hearing for this purpose. (R2)

At the sentencing hearing, Ramsey's public defender said his services were worth $750 while Bull's public defender submitted an affidavit for $1,000. (R442) The trial court stated that neither Bull nor Ramsey had had a chance to consider whether these amounts were fair. (R443) The court imposed the liens as requested by the public defenders but gave the defendants thirty days to request a hearing on the fairness of these amounts. (R443) The record does not reflect that a hearing was requested.

On appeal, petitioner argued that he had not received notice, hearing, and disinterested legal representation, as required by Jenkins v. State, 444 So.2d 947 (Fla.1984), Foust v. State, 478 So.2d 111 (Fla. 2d DCA 1985), and Graham v. Murrell, 462 So.2d 34 (Fla. 1st DCA *1984)*. The second district rejected these arguments, holding that the signed waiver in the affidavit of insolvency "dispensed with the notice and hearing requirements

of section 27.56(7) Florida Statutes (1985)." Ramsey v. State, 507 So.2d 742,743 (Fla.2d DCA 1987); Bull v. State, 507 So.2d 744,745 (Fla.2d DCA 1987).

These deceptively simple facts raise several issues for review by this court.

B.

First, the waiver of notice and hearing was invalid because petitioner was required to sign the waiver as the price of getting legal assistance by the public defender. Consequently, the mandatory waiver infringed on the "right to seek counsel by court appointment in that, to secure such constitutional right to counsel, the insolvent defendant [was] required to abandon a statutory right to notice and advocacy hearing on the question of lien and debt for Public Defender services." Gryca v. State, 315 So.2d 221,223 (Fla. 1st DCA 1975) (emphasis in original). Accord, McGeorge v. State, 386 So.2d 29 (Fla. 5th DCA 1980).

Moreover, after Gryca was decided, the rights to notice and hearing on public defender liens became constitutional as well as statutory rights. Jenkins. The mandatory waiver, found on all Polk County affidavits of insolvency, effectively and completely nullifies these constitutional due process rights, because indigent defendants in Polk County will never receive these rights. If the defendants sign the affidavit of insolvency, then they waive these rights. If they do not sign, then they cannot get a public defender and will not need these rights. Florida's legal system should not be allowed to avoid the dictates of due process in this manner.

C.

This waiver was also invalid because "the mere signing

of a boiler-plate statement to the effect that a defendant is knowingly waiving his rights will not discharge the government's burden." Jordan v. State, *334* So.2d 539,592 (Fla.1976), quoting, United States v. Hayes, *385* F.2d *375,377* (4th Cir.1967). Presumably, this rejection of boiler-plate waivers is based on the burden of the government to show that a waiver is knowing, intelligent, and voluntary. Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981). In the instant case, the state did not present any evidence from anyone present at the first appearance hearing which showed that the rights were carefully explained to the defendant, that he understood these rights and the consequences of waiving them, and that he voluntarily waived them.

Indeed, that this waiver was made intelligently with a full awareness of its consequences is hard to imagine. This waiver was the functional equivalent of giving the state a blank check to impose any amount it wanted without even telling the defendant about it. Consequently, the defendant could eventually acquire property without even knowing that a lien had been imposed against it. The state in this case cannot possibly satisfy its burden of showing this waiver was knowing and intelligent.

Thus, even if the waiver printed on the affidavit had been optional rather than mandatory, this optional waiver would not have been valid. Boiler-plate language on a printed form is insufficient to satisfy the state's burden. (See the appendix of this brief for an example of the Collier County affidavit of insolvency, which provides for an optional waiver. Although the Collier County waiver and others like it are not involved in this case, undersigned counsel requests this court to rule on its validity anyway, in order

to prevent future litigation.)

D.

The Polk County affidavit requires the defendant to authorize the court to set a public defender fee. Although the Collier County affidavit allows the defendant a hearing with opportunity to object, it suggests that a reasonable fee will be imposed regardless of the defendant's objections. The Hillsborough County affidavit (found in the appendix of this brief) also requires consent to a reasonable lien. The only objection apparently allowed is to the value of the services. These affidavits all suggest that whether the defendant can or will be able to pay is an irrelevant consideration at the hearing.

Jenkins, however, requires a hearing with opportunity to object even for $12 court costs which are fixed by statute. Obviously, an objection to the amount of this fixed cost would not be appropriate. Therefore, the only remaining possible objection that could be raised at a Jenkins hearing must be that the defendant has and will have no money to pay these costs. Without the allowance of an objection of this sort, a Jenkins hearing would be pointless.[1]

Accordingly, a public defender fee hearing should also allow opportunity for the objection that the defendant can not and will not be able to pay. The opportunity for this objection is certainly more necessary for the typically large public defender fee than for the small costs discussed in Jenkins. This interpretation of the hearing requirement also makes Florida law more consistent with Fuller v. Oregon, *417* U.S. *40 (1374).* In the course of rejecting

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1/ This reading of Jenkins is implied by but not made clear in Jenkins. This court may now wish to make this implication more explicit.

a claim that the Oregon fee recoupment system impermissibly chilled the indigent's desire to obtain counsel, Fuller emphasized that, by statute, an Oregon court could not order a convicted person to pay the fees unless he was or would be able to pay them. Id. at 45. The Oregon sentencing court had to take account of the financial resources of the defendant and the nature of the burden that payment of costs would impose. Id. No requirement to repay could be imposed at the time of sentencing if the defendant's indigency was unlikely to end. This interpretation of the hearing requirement is also consistent with section 27.56(4) Florida Statutes (1985), which allows the court to waive public defender fees if payment would impose manifest hardship.

Thus, the Polk, Collier, and Hillsborough affidavits all require consent to a public defender fee as the price of getting the public defender appointed. They amount to waivers of the right to object on the ground of inability to pay. They are therefore contrary to Jenkins, Fuller, and section 27.56(4). The absurdity of requiring these waivers is especially apparent in this case, where (1) large fees were imposed even though the defendant had been in prison for several years and would be in prison for several more and (2) a lien--unenforceable after one year, §85.051 Fla.Stat. (1985)--was imposed on the non-existent property of a long-term prisoner.

E.

Petitioner did not receive the notice required by section 27.56(7) Florida Statutes (1983) and Jenkins. Although the affidavit of insolvency properly gave notice that a public defender fee would be imposed, it did not constitute the notice contemplated by

section 27.56(7). The principal purpose of the notice requirement is not to tell defendants that a public defender fee is legally authorized and likely to be imposed on them, although this result is certainly desirable. Defendants are presumed to know what the law says. The principal purpose, rather, is to tell the defendants when the fees will be imposed, so that defendants can prepare their objections, if any. Since nothing in the record indicates that notice of this sort was given, and since the trial judge specifically stated that petitioner had not had a chance to consider the fairness of these fees, (R443) petitioner did not in fact receive the notice required by section 27.56(7). Foust v. State, *478* So.2d 111(Fla. 2d DCA *1985).*

Petitioner **also** did not receive the required hearing. He was merely told that if he wanted to object, he could do so within *30* days. (R443) Section 27.56(7), however, clearly contemplates that a hearing be held before the imposition of fees. At least two district courts agree that allowing an opportunity for a hearing after the fees had already been imposed does not comport with due process and the statute. Cliburn v. State, 510 So.2d 1155 ~~12 F.L.W. 1944~~ (Fla.3d DCA Aug. **11,** 1987); Thomas v. State, *486* So.2d 69 (FLa. 4th DCA 1986).

The procedure used by the trial judge was authorized by Florida Rule of Criminal Procedure *3.720* (d). This procedure, however, is inefficient and constitutes bad policy. 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. Rule 3.720(d) means moreover, 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. Wolfson v. State, 437 So.2d 174 (Fla.2d DCA 1983) Finally, as already noted, Rule 3.720(d) is inconsistent with due process and the case law. This court should correct Rule 3.720(d) accordingly.

F.

Defense counsel submitted an affidavit for a public defender fee, which the court accepted. (R443) Presumably, the affidavit was submitted in reliance on section 27.56(1) Florida Statutes (1983), which states that the public defender "shall move the court to assess attorney's fees and costs against the defendant." The first district, however, has ruled that this part of section 27.56(1) is unconstitutional. Graham v. Murrell, 462 So.2d 34(Fla.1st DCA 1984). The state apparently did not appeal Graham to this court, and in consequence, the offending sentence has never been removed from the published statute books. This court should approve Graham.

Graham reasons that public defenders cannot ethically represent their clients and at the same tine participate in the imposition of public defender fees against their clients. See also, Baran v. State, 381 So.2d 323(Fla.5th DCA 1980) (public defender should not represent client who is charged with not paying public defender fee). Public defenders cannot act as representatives of the state and provide evidence to support imposition of public defender fees and at the same time act as advocates for their clients and do whatever is necessary to prevent or correct these fees. Since the offending sentence in section 27.56(1) assigns both of these imcompatible duties to the public defenders, the sentence is unconstitutional.

This reasoning applies with equal force to section 27.56(7), which requires representation of counsel at the fee hearing. These counsel cannot be the public defenders because, according to Graham, they would be acting unethically if they act for both the state and the defendant at the same hearing. Nevertheless, in the instant case, petitioner was represented by his public defender. Consequently, since his counsel had been placed in an ethical dilemma, petitioner was not represented by the disinterested counsel contemplated in section 27.56(7). The proceedings below were therefore invalid.

G.

Defense counsel below also had a conflict of interest in another way. The public defender fees go to the county "to defray the expenses incurred by the county in defense of criminal prosecutions." §27.562 Fla.Stat.(1983). The county in turn pays for the public defender's office space, utilities, custodial services, expert witness fees, travel expenses, court reporter costs, and deposition costs. §27.54 Fla.Stat.(1983). The obvious solution, then, to the continual need of public defenders for more money and better working conditions is to get the money from their indigent clients. Public defenders might thus want to request arbitrarily high fees and to violate their clients' due process rights with regard to notice and hearings. The clients, of course, will not know what hit them, because the only counsel available to advise them on their rights and on the reasonableness of the requested fees are precisely the same public defenders who want the fees imposed.

Indeed, the undersigned appellate public defender is not immune from this obvious conflict of interest. He is a member of the same public defender's office that handled the instant case at

trial. Consequently, he too benefits when public defender fees like this one are imposed.

To be sure, Fla. Ear Code Prof. Resp. D.R. 5-103(A)(1) and Fia. Bar Rules Prof. Cond. 4-1.8(i)(1) allow lawyers to acquire liens against their clients. These rules are not relevant here because, in the typical case, a client who dislikes a lien can hire a different lawyer to attack it. Here, by contrast, the most an indigent defendant can hope for is the appointment of a special assistant public defender. Since this court appointed counsel will also be paid by the county, this new counsel will have exactly the same ehical problem that the public defender had before him.

Thus, when 27.56(7) requires the assistance of counsel at the public defender fee hearing, it forces whoever represents the defendant "onto the horns of an ethical dilemma. This it may not constitutionally do." Graham, 462 So.2d at 36. Since the offending portion of the statute cannot be removed without doing violence to the statute as a whole, section 27.56 should be ruled unconstitutional in its entirety.

ISSUE II

THE COURT ERRED BY REFUSING TO ADMIT EVIDENCE RELEVANT TO THE CODEFENDANTS' MOTIVE FOR LEAVING THE PRISON.

The court refused to admit the following evidence proferred by Bull and Ramsey.

Earlier in June, Ramsey feared for his life because a black inmate told him he would be "dead meat" if Ramsey did not pay $10 per week. (R172) Later, five black inmates beat and wounded Ramsey. (R172) Because of this fight, Ramsey went to a classifications officer who denied his request for a transfer. (R176,305) On the day of the alleged escape, two black inmates threatened Bull and Ramsey with knives and told them to be gone by that night or their lives would be forfeit. (R177,306) They went to a known prison informant and told him they were going to escape without the intent to escape. (R172) They knew that the informant would tell the authorities. (R173) The informant left a message with Officer Quinn which Quinn did not receive until after the alleged escape. (R304) According to Quinn, however, the message was that the informant intended to escape with Bull and Ramsey and then changed his mind. (R310)

Bull and Ramsey said this evidence was relevant to their motive for wanting to leave the prison without in fact having the intent to escape. (R317,319) They only wanted a transfer. (R320) The judge refused to admit this evidence, because it related to the necessity defense. (R320) In the judge's view, unless the evidence actually atisfied the criteria for the defense, any evidence relevant to it would be too prejudicial. (R159-160) Consequently, the proffered evidence was inadmissible, even though it might be relevant

to Defendants' motivation for wanting a transfer. (R320-321)

This reasoning was wrong because the test of admissibility is relevance. Ruffin v. State, 397 So.2d 277 (Fla. 1981). The evidence proffered here was relevant because the legitimate motives of avoiding injuries and seeking transfers tended to disprove the existence of criminal intent, a material fact necessary for conviction of escape. Helton v. State, 311 So.2d 381 (Fla. 1st DCA 1975); 590.401 Fla.Stat. (1985). This evidence showed the reasons behind and the entire context of the alleged criminal acts and was therefore relevant. Heiney v. State, *447* So.2d 210 (Fla. *1984);* Tafero v. State, *403* So.2d 355 (Fla. 1981).

Furthermore, although the evidence was prejudicial to the State's case as the judge correctly asserted, it was not unfairly so. §90.403 Fla.Stat. (1985). Evidence which merely tended to disprove the State's material facts was clearly not unfair. The evidence was also not unfairly prejudicial in the sense of confusing the issues or misleading the jury, id., because, this issue, whether defendants had a criminal motive for leaving the prison, was the exact issue which the jurors were supposed to decide.

Indeed, if anything, exclusion of this evidence unfairly prejudiced the Defendants because the jurors had to decide this issue of intent with only the bare assertion that the Defendants wanted a transfer. Obviously, jurors will discount this desire as being arbitrary and meritless unless they know the reasons for it.

Defendants are entitled to any defense they can legitimately make. Muro v. State, 445 So.2d 374 (Fla. 3d **CCA** 1984). "he court's ruling here erroneously truncated a legitimate defense.

The error cannot be said beyond a reasonable doubt not to have affected the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The State also opened the door to this evidence. The State was allowed to show that Bull was serving 20 years in prison while Ramsey was serving 7 years. (R292) The purpose of this evidence was to support an inference that someone with a long sentence has a greater motive for escaping than someone with a short sentence. (R192) Appellants attacked this alleged motive by showing that with gain tine, the actual sentences would not be so long. (P.295) The State was then allowed to attack the attack of the motive by showing that Bull was serving two consecutive sentences and would not get gain time on the second sentence until the first sentence was served. (R301) When Defendants wanted to attack the State's suggestion of improper motive in another way by showing that threats from other prisoners made the Defendants try to fake an escape in order to get a transfer, however, the court refused to admit the evidence. (R317-319)

This refusal was error because the State had opened the door to this evidence. "One opens the door to an otherwise proscribed area or topic by asking questions relating to that area." Payne v. State, 426 So.2d 1296, 1300 (Fla. 2d DCA 1983). The State asked questions relating to the Appellants' alleged improper motive. Appellants should therefore have been allowed to contradict the State's inference of improper motive with evidence showing that the motive was in fact proper. McCrae v. State, 395 So.2d 1145 (Fla. 1981).

The exclusion of this evidence truncated Defendants' only

defense. Consequently, this error was harmful because it cannot be said beyond a reasonable doubt not to have affected the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

Based on the preceding arguments, Petitioner requests this court to vacate the judgment and sentence, strike the public defender fees, and remand to the trial court with directions to hold a new trial.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Steve Krosschell
STEPHEN KROSSCHELL
Assistant Public Defender

Polk County Courthouse
P.O. Box 9000-Drawer PD
Bartow, FL 33830
(813) 534-4200

COUNSEL FOR PETITIONER