IN THE SUPREME COURT OF FLORIDA

KENNETH ATWOOD FORRESTER,

Petitioner,

v. CASE NO. 74,166

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF PETITIONER ON JURISDICTION

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. All proceedings below were before Circuit Judge G. Robert Barron.

II STATEMENT OF THE CASE

An information filed in the circuit court for Okaloosa on August 12, 1987 charged Kenneth Forrester with the possession of less than 20 grams of marijuana and the possession of cocaine (R 1-2). Forrester later filed a Motion to Suppress (R 3-7) which the court, after hearing evidence and argument on the matter, denied (R 8-9).

Forrester then pled nolo contendere to the charges, specifically reserving his right to appeal the trial court's order denying his Motion to Suppress (R 23). The court adjudged him guilty of those offenses and placed him on three years probation for the possession of cocaine offense and one year probation for the marijuana offense (R 28). The terms of the probation were to run concurrently with one another (R 28).

Forrester filed a timely appeal. After reviewing the case, Forrester's appellate counsel filed a brief complying with what he thought were the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

In an order dated January 18, 1989 the First District Court of Appeal court ordered Appellate counsel to brief the issue of whether, "in the context of a non-consensual, warrantless search, a canine alert, without more, constitutes probable cause." (Appendix A) Appellate counsel, in response, filed a "Motion to Clarify or Appoint Other Counsel" on January 20, 1989. (Appendix B) In that motion, appellate counsel asked the First District to clarify what it wanted him to file. He explained the perceived ethical problems he thought he would

have if he complied with this court's order. Specifically, he believed that if he complied with what he thought the court wanted he would be forced to prepare a brief that went against the best interests of his client.

In an opinion dated April 28, 1989 the court clarified what it wanted appellate counsel to do to comply with what it believed were the dictates of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). (Appendix C) Specifically, on page 8 of its opinion, this court said appellate counsel must talk with trial counsel about the merits of the appeal, and trial counsel must agree with appellate counsel's evaluation of the frivolousness of the case. If trial counsel does not agree, then appellate counsel must

> include ...a satisfactory explanation of why such concurrence could not be obtained. We consider it essential that an Anders brief which contains a representation that the appeal is wholly frivolous or without merit shall contain also the above representation of appellate counsel's having communicated with trial counsel.

(emphasis in opinion.)

III STATEMENT OF THE FACTS

Deputy Johnson of the Okaloosa County Sheriff's office went to the Scampi Restaurant in Okaloosa County on October 27, 1987 because someone had reported some criminal mischief afoot (R 4). When he got there, the person who had reported the incident said that someone had scratched his car, but he did not want the incident reported (R 37). He went on to say that he believed Forrester had drugs in his car which was parked in the restaurant parking lot (R 34). Officer Johnson called Deputy Davis, who came to the restaurant with his "K-9 dog, Brutus" (R 4).[1] Davis walked the dog around several cars, and it alerted to the presence of drugs in Forrester's car and another car (R 5).

Forrester was in the kitchen of the restaurant cooking or preparing food (R 36), and Deputy Johnson went in and asked him to step outside and stand by his car (R 36, 39).

Deputy Davis asked Forrester to open his car, which he did (R 40). The two officers then searched the car and found the cocaine and marijuana (R 40-41, 47).

---

[1] The dog handler, Herman Davis, had been trained in dog handling (R 43). The dog had been trained in narcotics detection and was certified by the Okaloosa County court system (R 43).

IV SUMMARY OF THE ARGUMENT

The First District's opinion in this case tells the Public Defender what it wants him to include in an Anders brief to comply with what it thinks are the requirements Anders. By doing so, the court has written an opinion that expressly affects a class of constitutional officers, the Public Defenders.

What the First District wants the Public Defender to do also conflicts with the Rules Regulating the Florida Bar. These are rules this court has adopted. The opinion conflicts with these rules because it requires the attorney to violate his duty of confidentiality and loyalty to his client by divulging why he thinks the clients appeal is frivolous. The rules, on the other hand, require the attorney to represent his clients bests interests, and those interests are best preserved by maintaining attorney loyalty to the client and the confidence of his communications with the client.

V ARGUMENT

FIRST ISSUE PRESENTED

THE FIRST DISTRICT'S OPINION IN THIS CASE EXPRESSLY AFFECTS THE PUBLIC DEFENDER, A CONSTITUTIONAL OFFICER. ART. V, §18 FLA. CONST.

The Public Defender for the Second Judicial Circuit is a constitutional officer. Art. V, §18 Fla. Const. As such, if the First District has issued an opinion that expressly affects the Public Defender, this court can exercise its discretionary power to accept jurisdiction in this case Art. V, §3(b)(3), Fla. Const.; Rule 9.030 (a)(2)(A)(iii) Fla.R.App.P. The only question is whether the First District's opinion in this case "expressly" affects the Public Defender.

The Public Defenders are expressly affected if the First District's opinion said something that affects the Public Defender. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980); School Board of Pinellas County v. District Court of Appeal, 467 So.2d 985 (Fla. 1985). In School Board, the Pinellas County School board asked this court to accept jurisdiction in their case on the ground that it affected a class of constitutional officers. This court refused to accept jurisdiction because the District Court's opinion merely was an affirmance with two case citations. Nothing in that opinion "expressly" affected the school board members.

On the other hand, if the decision directly and in "some way, exclusively affect[s] the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers" this court will have

jurisdiction over the case. Spradley v. State, 293 So.2d 697 (Fla. 1974). See also, Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980) (State attorneys affected by decision allowing euthanasia); Taylor v. Tampa Electric Company. 356 So.2d 260 (Fla. 1978) (Circuit court clerks affected by decision prohibiting clerks from collecting commission on sums paid from registry); Heath v. Becktel, 327 So.2d 3 (Fla. 1976) (circuit court clerks affect by decision ordering clerk to issue subpoena duces tecum); State v. Laiser, 322 So.2d 490 (Fla. 1975). So it is here.

In the First District's opinion, the court is directing the Public Defender to file Anders briefs in a particular fashion. For example, on page 8 of its opinion, the court said:

> Finally, a brief that fails to make any reasonable argument in support of the designated judicial acts, but which otherwise abides by Anders, as above stated, must contain a representation in the brief that appellate counsel has discussed the designated acts with trial counsel and has also communicated with the defendant, together with the statement that trial counsel agrees defendant, together with the statement that trial counsel agrees that the designation present wholly frivolous issues. If appellate counsel is unable to acquire the concurrence of trial counsel in such conclusion, then he or she must include as well a satisfactory explanation of why such concurrence could not be obtained. We consider it essential that an Anders brief which contains a representation that the appeal is wholly frivolous or without merit shall contain also the above representation of appellate counsel's having communicated with trial counsel.

(emphasis supplied. Footnote omitted.)

Those specific directions regarding how the Public Defender will file Anders briefs will expressly and directly

affect or influence (or any other synonym) how the Public Defender prepares Anders briefs. This court should accept jurisdiction in this case because the First District's opinion expressly affects a class of constitutional officers: the Public Defenders.

SECOND ISSUE PRESENTED

THE FIRST DISTRICT'S OPINION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE RULES 4-1.6 AND 4-1.7 OF THE RULES REGULATING THE FLORIDA BAR WHICH THIS COURT HAS ADOPTED, RULES REGULATING THE FLORIDA BAR, 494 So.2d 977 (FLA. 1986).

The First District's opinion also affects how the Public Defender will practice law, a matter over which this court has exclusive jurisdiction. Times Publishing Company v. Williams, 222 So.2d 470, 475 (Fla. 2d DCA 1969) overruled on other grounds. Neu v. Miami Herald Publishing Company, 462 So.2d 821 (Fla. 1985). That is, this court has the exclusive right to proscribe the rules of professional conduct. Id. The First District, by requiring appellate counsel to explain why he and trial counsel may disagree regarding the merits of any issue, will force appellate counsel to breach his duty of loyalty to his client.

The preamble to Chapter 4 of the Rules Regulating the Florida Bar says:

> A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Profession conduct or by law.

Rule 4-1.6 of the Rules provides:

> (a) A lawyer shall not reveal information relating to representation of a client except as state in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.

Rule 4-1.7 (b) of the Rules provides:

> (b) A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or the a third person or by the lawyer's own interest...

The comment to Rule **4-1.7** provides, in part:

> Loyalty is an essential element in the lawyer's relationship to a client...
>
> Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

Although Times Publishing Co. supra. dealt with a legislative encroachment upon a lawyer's obligation to his client, the court's rationale applies this case. The legislature had enacted a government in the sunshine law. Times Publishing Co. wanted, among other things, meetings between the Pinellas County School Board and its attorney to be open to the public. The Second District Court of Appeal rejected that request. It said the legislature could not, directly or indirectly, interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court. Id. at **475.**

> He cannot be put in the untenable position of choice between a violation of a statute or a violation of a specific Canon insofar as they clearly conflict. We can perceive of the possibility af instance when there may be conflict between the two as they may relate to privacy and confidentiality in the handling of pending or anticipated litigation.

Id.(emphasis in opinion)

The First District's opinion expressly and directly conflicts with the cited Rules regulating the Florida Bar because the court requires a Public Defender to choose between his loyalty to his client and confidentiality of matters arising out of his representation, and his duty to obey an order of the court. Rules Regulating the Florida Bar, **494** So.2d **977** (Fla. **1986).** A lawyer's obligation of loyalty and

confidentiality to his client should not be denied by an order of the court.

This court should accept this case for review to resolve the conflict between the decisions of the First District Court of Appeal and the Rules Regulating the Florida Bar.

VI CONCLUSION

Based upon the arguments presented here, Kenneth Forrester respectfully asks this honorable court to grant his petition and accept review in this case.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Initial Brief of Appellant has been furnished by hand delivery to, Richard E. Doran, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, KENNETH ATWOOD FORRESTER, c/o Buford Forrester, Post Office Box 207, Cowarts, Alabama, on this 12th day of May, 1989.

DAVID A. DAVIS