O/a 689

IN SUPREME COURT OF FLORIDA

KENNETH ATWOOD FORRESTER,

Petitioner,

vs. Case No. 74,166

STATE OF FLORIDA,

Respondent.

MERITS

RESPONDENT'S BRIEF ON ~~JURISDICTION~~

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PRELIMINARY STATEMENT

This case was accepted by the Court for discretionary review pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iii).

A copy of the decision of the First District Court of Appeal is attached as an Appendix to this brief for the convenience of the Court. Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989).

The record on appeal consists of one volume and will be referred to by the use of the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement with the following additions:

As part of its January 18, 1989 Order directing appellant to brief the issues of whether "in the context of a nonconsentual, warrantless search, a canine alert, without more, constitutes probable cause," the District Court of Appeal directed the State of Florida to also brief the issue. The State responded with a nine-page brief detailing the facts of the case presenting case authority which it asserted was on point as to the question. A copy of this brief is attached as part of the appendix to this brief.

Ignoring the State's brief, the court again directed the Public Defender to file a brief. However, the court changed the question as follows:

> Accordingly, the assistant public defender is directed to file within fifteen days from the date of this opinion a supplemental brief, complying with the above criteria, which shall be directed to the following issue; in applying a totality of circumstances test, adopted by the United States Supreme Court in Illinois v. Giddens, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), was there probable cause for the officers to conduct a warrantless search of appellant's automobile? The State is permitted to file an answer brief, if it

> desires to do so, within ten days after service of appellant's supplemental brief.

Forrester v. State, 542 So.2d at 1362.

STATEMENT OF THE FACTS

Respondent relies on its Statement of the Case and Facts as contained in its brief to the District Court of Appeal. (See Appendix).

SUMMARY OF THE ARGUMENT

By its decision in this case, the District Court of Appeal has effectively written a rule of conduct for court-appointed defense attorneys and public defenders regarding the method by which they are to proceed in filing briefs pursuant to Anders v. California. Because this decision squarely impacts a class of constitutional officers, the Attorney General of Florida has joined the petition filed by the Public Defender seeking this Court's review.

Forrester is grounded on two questionable assumptions. First, there is no support for its implication that privately retained lawyers will argue issues that court-appointed lawyers or public defenders will not argue merely because the former are paid by their clients. Furthermore, there is little evidence to indicate that a problem exists regarding ineffective assistance of counsel by various public defenders in the state. On the contrary, this Court should note that the great majority of appellate dispositions in criminal cases are by means of a *per curiam* affirmance or "PCA."

A second false assumption presented by Forrester is that a defendant's sole remedy for unjust conviction is his direct appeal. Florida's procedural mechanism provides a wide range of collateral review to a convicted inmate by means of Rules 3.800,

3.850, and Petition for Writ of Habeas Corpus as set forth in Article V, Section 3 of the Florida Constitution. These collateral remedies provide ample resource for convicted defendants who are unsatisfied with the performance of their appointed counsel.

While the Attorney General does not agree with all points raised by the Public Defender, we do find fatal flaws in this decision.

The Attorney General contends that the approach taken in the Forrester opinion violates the separation of powers doctrine and places an appellate court in the position by which it dictates to the public defender agency the method by which it is to accomplish its work.

Furthermore, we contend that an adoption of the Wisconsin practice discussed in McCoy v. Court of Appeal, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 440 (1988), would do little or nothing to guarantee the right to effective representation counsel on appeal. The Attorney General finds the procedure set forth in Penson v. Ohio, 488 U.S. ___, 109 S.Ct. ___, 102 L.Ed.2d 300 (1988), better suited towards protecting the rights of indigent criminal defendants and would urge this Court to adopt it and apply it in concert with this Court's prior decision in State v. Causey, 503 So.2d 321 (Fla. 1987).

ARGUMENT

ISSUE PRESENTED

THE FIRST DISTRICT'S REQUIREMENT THAT APPELLATE COUNSEL REPORT THE RESULT OF CONVERSATIONS WITH THE TRIAL LAWYER REGARDING THE MERIT OR LACK OF MERIT OF ISSUES HE PLANS TO RAISE ON APPEAL VIOLATES FORRESTER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND IT ALSO FORCES APPELLATE COUNSEL TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT.

I. INTRODUCTION

The Attorney General of Florida took the extraordinary step of joining the Public Defender's petition to this Court because he is of the opinion that only this Court can effectively resolve the multitude of issues and problems which have arisen as the lower courts of this state have conscientiously attempted to interpret and apply Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)[1]. As was discussed in our brief on jurisdiction, the Public Defender of the Second Judicial Circuit and the First District Court of Appeal have a long history regarding the application of Anders to their mutual cases. Faust v. State, 505 So.2d 8 (Fla. 1st DCA 1987); Stokes v. State, 485 So.2d 875 (Fla. 1st DCA 1986); Smith v. State, 496 So.2d 971,

[1] The Attorney General has filed a motion to restyle the case In Re: Order of the First District Court of Appeal Pursuant to Anders v. California. This case should not be continued as State v. Forrester in that the State is not a party.

(Fla. 1st DCA 1987), on remand, 508 So.2d 540 (Fla. 1st DCA 1987).[2]

A review of the instant decision of the First District brings to mind the words of the three dissenting justices in Anders v. California, supra:

> The court today holds this procedure unconstitutional, and imposes upon appointed counsel who wishes to withdraw from a case he deems "wholly frivolous" the requirement of filing "a brief referring to anything in the record that might arguable support the appeal." But if the record did present any such "arguable" issues, the appeal would not be frivolous and counsel would not have filed a "no-merit" letter in the first place.
>
> The quixotic requirement imposed by the court can be explained, I think, only upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a "no-merit" letter is not to be trusted. That is an assumption to which I cannot subscribe. I cannot believe that lawyers appointed to represent indigents are so likely to be lacking in diligence, competence, or professional honesty. Certainly there was no suggestion in the present case that petitioner's counsel was either incompetent or unethical.

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[2] The Fourth District Court of Appeal has also adopted the Forrester standard. Smith v. State, 14 F.L.W. 2013 (Fla. 4th DCA August 30,1989).

Anders v. California, 18 L.Ed.2d at 499-500. (Mr. Justice Stewart with whom Mr. Justice Black and Mr. Justice Harlan join dissenting).

Indeed, the nebulous standard of "reasonableness" so often employed by the Warren court[3] seems to be the core concern in the instant case as the opinion below contains a passage that deeply troubles the Public Defender:

> In our judgment, the briefs submitted by the Assistant Public Defender, with its one sentence reference to two cases, fails to conform with Anders' requirement that counsel conduct "a conscientious examination" of the case, Anders, 386 U.S. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498, as a precondition to any motion by appellate counsel to withdraw. Neither are we satisfied that the attorney has satisfied Anders' demand that his brief refer "to anything in the record that might arguably support the appeal." Id. In our interpretation of the duties placed upon counsel by Anders, we stated in Smith, 496 So.2d at 974, that "counsel should . . . present such argument as can ***reasonably*** be made in support of the defendant's position on each designated act, with appropriate citations to the record and pertinent authority, if there is any." (Emphasis added). If, however, "appellate counsel conclude[s] that he or she cannot make any reasonable argument in respect to the designated acts, then he or she should, before filing a brief in this

[3] And so often condemned by Mr. Justice Black, Turner v. United States, 396 U.S. 398 (1970)(Black, J., dissenting).

> court, discuss the designated judicial acts with trial counsel and communicate with the defendant." Id.

Forrester v. State. 542 So.2d at 1359-60.

If left to the various court of appeal and various public defender agencies, attempts at applying the *reasonableness* standard will create a patchwork cloak of representational standards throughout the state. Obviously, lack of uniformity raises concern for equal protection under law and for adherence to the separation of powers doctrine. The Attorney General believes that only this Court can develop a standard for Anders review that will adequately address these concerns as well as the public defender's concerns with the ethical requirements placed on Florida attorneys and the Sixth Amendment guarantee of effective representation on direct appeal of a criminal case.

11. THE ROLE OF THE ATTORNEY

In Penson v. Ohio, supra, the Supreme Court reaffirmed the standard for appellate counsel set forth in Anders v. California, supra. The court reiterated the need for "a conscious examination of the case coupled with a brief referring to anything in the record that might arguably support the appeal." Penson 102 L.Ed.2d at 309. Furthermore, as Justice Brennan noted in his dissent to McCoy v. Court of Appeal, supra:

> Naturally, the defense counsel's duty to advocate, whether on appeal or at trial, is tempered by ethical rules. For example, counsel may not in her zeal to advocate her client's case fabricate law or facts or suborn perjury, and must at times disclose law contrary to her client's position. (Citation omitted). Similarly, defense counsel have an ethical duty not to press appeals they believe to be frivolous, even though other lawyers might see an issue of arguable merit. See *Polk County, supra,* at 323-324, 70 L.Ed.2d 509, 102 S.Ct. 445. For retained counsel, who may decline to represent a paying client in what counsel believes to be a frivolous appeal, the latter duty does not interfere with the duty of unwaivering allegiance to the client. Since, however, court appointed counsel may withdraw only with court approval, the indigent client who insists on pursuing an appeal his counsel finds frivolous presents a unique dilemma: appointed counsel, cast ostensibly in the role of defender, must announce to the court that will rule on her client's appeal that she believes her client has no case.

100 L.Ed.2d at 458.

To this delicate balance the Forrester opinion adds an additional requirement that appellate counsel discuss the designated judicial acts to be reviewed with trial counsel and prepare for the appellate court a designation that trial counsel agrees that these issues are frivolous. Forrester, at 1361. This requirement is not found in any decision of the United States Supreme Court or of this Court. It is respectfully sub-

mitted that this procedure adds little or nothing to the appellate assessment in that most, if not all, appellate issues differ greatly from those that normally confront the trial lawyer. Trial lawyers in the state system rarely file legal memoranda in support of their motions to suppress evidence or confessions, rarely raise issues concerning a concept such as retroactivity, rarely contest sentencing decisions on grounds of equal protection or due process or otherwise engage in the type of issue analysis which most frequently appears in the appellate courts. Frankly, many trial attorneys may feel a particular issue has merit when their own failure to raise a timely objection to the offending evidence bars the claim from appeal. Thus, Forrester's requirement that appellate counsel speak to trial counsel is apparently unsupported by case precedent and is additionally, practically unsound.

The Forrester opinion mixes apples with oranges when it sets forth the above requirement for trial counsel consultation in the context of an Anders brief. In the Forrester case, the district court went on at some length regarding the inadequacy of the public defender's response pursuant to Anders. Id. at **1360-61**. The Attorney General cannot quarrel with the general concept that a court may reject a brief because it does not meet recognized standards. It is when the court goes beyond the requirement that counsel abide by Anders and begins to direct how a particular

attorney goes about preparing a brief that the opinion stumbles into dangerous grounds.

111. SEPARATION OF POWERS

Plainly stated, Article I, Section **18** of the Florida Constitution provides that the elected Public Defenders will run the Public Defender's Office subject to the electoral whim of the populace. The courts will interpret the law and adjudicate the claims and controversies presented to them. When a district court of appeal begins to write opinions directing how an assistant public defender is to do his job, that determination violates the separation of powers clause. Such encroachment must not go unquestioned regardless of the laudable intent of the court in attempting to resolve a difficult issue.

As Mr. Justice Jackson stated in his concurring opinion in the case of Youngstown Sheet and Tube Company v. Sawyer, **343** U.S. **579, 72** S.Ct. **863, 96** L.Ed.2d **1153 (1952):**

> The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policy - such as wages or stabilization - and lose sight of enduring consequences upon the balance of powers structure of our republic.

Id. at 96 L.Ed.2d at 1198.

The caution we urge upon this Court is not to allow this somewhat isolated problem, somewhat unique to this district, from justifying a wholesale blurring of the line between the court and the public defender. Although research failed to reveal any case squarely discussing this issue, we would urge the Court to compare our position to the results reached in the following cases. Miller v. Carson, 392 F.Supp. 511, aff'd in part, reversed in part, 563 F.2d 741 (5th Cir. 1977)(district court held it lacked expertise to instruct local fire marshal as to technical aspects of compliance with court's order to remedy overcrowded jail); Ridaught v. Div. of Fla. Highway Patrol, 314 So.2d 140 (Fla. 1975)(court's authority to review hiring policies of the Florida Highway Patrol was limited to a review of whether certain requirements were reasonable in constitutional framework. Specific technical requirements of trooper position were left solely to discretion of the patrol itself); and United States v. Pabian, 704 F.2d 533 (11th Cir. 1983)(court emphasizes that the "tradition and the dynamics of the constitutional scheme of separation of powers define a limited function for both court and prosecutor in their dealings with the grand jury.").

What these cases imply is a respect for the distinction between a court's ability to recognize a constitutional violation

as opposed to a complaint over the technical aspects of how the executive performs his duty. Only if this Court is satisfied that the problem found in this case rises to a level of constitutional violation should it accept the procedure of the district court of appeal. Arguably, this approach could be implemented through a rule of appellate procedure or other adequate standard. However, there seems to be little need for such an approach on a statewide basis.

If a court is unhappy with a particular assistant public defender, the court may require that the elected public defender show cause regarding the approach taken in a particular case or cases. Or the court, in particularly egregious situations, might refer an attorney to the Florida Bar. **See,** e.g. Molina v. State, **447** So.2d 253 (Fla, 3d DCA 1983). Such action would be focused upon particular attorney conduct after the fact as opposed to directory instruction regarding how a lawyer is to handle a pending case. If left unchecked, the court may next require that a lawyer spend a set number of hours in the law library or a set number of minutes researching on a computer terminal. Once such encroachment begins there is no way to draw the line. Therefore, the Attorney General strongly condemns any attempt by the district court to control the method of practice of the Public Defender's Offices.

IV. THE ROLE OF THE APPELLATE COURT

The bottom line to this litigation appears to be a desire by the district court of appeal to avoid having to undertake a complete review of the record as is required of it by Anders and by this Court in State v. Causey, supra. In Causey, the issue presented was "to what extent must a district court review the record pursuant to the filing of an Anders brief." Rejecting the State's argument that the appellate court could satisfy itself with a cursory review, this Court held that Anders required a vigorous review independent of the parties. Id. at 322. However, Justice Kogan provided the following *caveat*:

> This is not to say that we read Anders as requiring a fine tooth comb style of review. By no means should this opinion be read to require district courts to read between the lines of a record to discover the most remote, unlikely error. At the very least, however, pursuant to Anders, in order to assure indigents fair and meaningful appellate review, the appellate court must examine the record to the extent necessary to discover any errors apparent on the face of the record. Id.

Despite this plain statement from Causey, the district court of appeal is apparently using a fine tooth comb. Recall, the district court initially asked for briefing on the question of the viability of a dog-sniff alert to establish probable cause. Despite the State's detailed reply brief, the court went back to

the record and recreated a second significantly different question regarding the good-faith exception to the Fourth Amendment. This suggests that the First District is not following the Causey standard and that it seeks to impose upon defense counsel the unrealistic responsibility to create new and interesting issues despite counsel's ethical position that no such issues exist. The district courts of appeal have no right to insist that defense attorneys assist them in carrying out more than Anders or Causey requires. As noted in Penson, supra:

> The Anders brief is designed both to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their client's appeal to the best of their ability and also to help the court make the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.

The Forrester opinion does more than direct the lawyer to assist the court in its role. It requires the attorney to do the court's work for it.

V. SETTING A STANDARD

If the Forrester approach is to be abandoned, how can the courts of this state insure that the standard of Anders is applied evenly to all criminal appeals. Obviously, the answer must come from this Court so as to insure a uniformity in

approach and application. The Attorney General suggests that the Court should reaffirm the core commitment to the standard set forth in Anders and indicate that a district court of appeal may at any time reject a brief which fails to comport with those standards. Mosley v. State, 14 F.L.W. 2151 (Fla. 4th DCA September 13, 1989). Additional discipline can be administered as needed. See, Molina v. State, supra.

Once counsel has met his initial burden, of complying with Anders, the court should allow the appellant to file a *pro se* brief with the court. The court should then fully review the record to determine whether the issue is wholly frivolous. If the court has reasonable doubt concerning any issue, the court should allow original counsel to withdraw and it should appoint new counsel and direct that counsel to brief the case. Penson, at 102 L.Ed.2d 310. See, also, McCoy, supra, at 100 L.Ed.2d 459, (Brennan, J, dissenting) discussing Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958). The court may also ask for input from counsel for the appellee regarding any particular point of law or fact.

If, as here, appointed counsel again declares that the point raised by the court of appeal is wholly frivolous, the court should abide by Penson v. Ohio, supra, allow that attorney to withdraw, and appoint a new attorney to handle the entire appeal.

See, Polk County v. Dodson, 454 U.S. 312, 323, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)(Attorneys have a duty not to file frivolous motions or appeals). Obviously, one of two things will then happen. The second attorney will brief an issue or issues and the appellant will receive an adversarial proceeding. Or, the new attorney will likewise file an Anders brief. If this second course is taken, it should be apparent to all concerned that the case is in fact wholly frivolous and that no further proceeding is necessary to protect the constitutional rights of the accused.

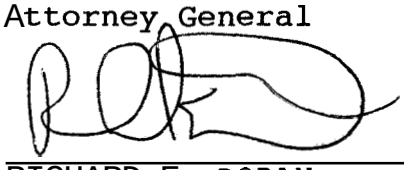
Based upon these decisions, we urge this Court to reject the McCoy/Forrester approach. There is no basis for a district court to order an appellate lawyer to consult with, and obtain a statement of agreement from, a trial lawyer. Likewise, McCoy's requirement that an attorney essentially brief the case against his client might be appropriate for Wisconsin, but as Justice Brennan's dissent clearly indicates, it is not a necessary standard and is one that could cause considerable mischief in our appellate system. Accordingly, the Attorney General urges this Court to reverse the opinion of the district court of appeal and remand for further proceedings consistent with Penson, Anders, and Causey, supra.

CONCLUSION

Based on the foregoing argument and the citations of authority, Respondent prays this Honorable Court reverse and remand this case for further consideration.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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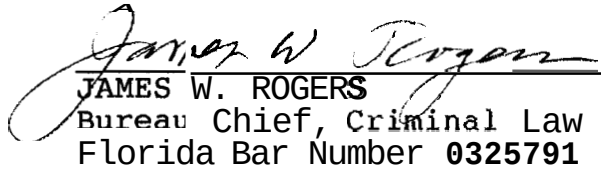

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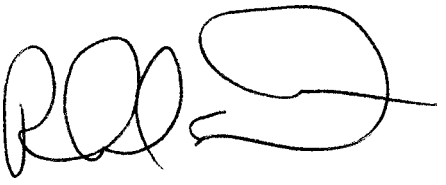
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DAVID A. DAVIS, **Esq.**, Assistant Public Defender, and CARL MCGINNES, **Esq.**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, **301** South Monroe Street, Tallahassee, Florida **32301**, this 20 day of October, 1989.



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