IN THE SUPREME COURT OF FLORIDA

Order of the Ist DCA
Re Brief filed in

PAUL TERRY MURRAY,

Petitioner,

v. CASE NO. 74,536

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Paul Terry Murray was the defendant in the trial court and will be referred to herein by his proper name. The State of Florida was the prosecution below and will be referred to in this brief as the state. The record on appeal will be referred to by the symbol "R" and the transcript of the plea and sentencing proceedings will be referred to by use of the symbol "T", each followed by the appropriate page number in parentheses. All trial proceedings took place in the Fourth Judicial Circuit Court, in and for Duval County, Florida, the Honorable R. Hudson Olliff, Circuit Judge presiding. All appellate proceedings took place in the First District Court of Appeal. All emphasis is supplied unless otherwise noted.

II. STATEMENT OF THE CASE AND FACTS

Paul Terry Murray was charged by information on May 18, 1988 with two counts of capital sexual battery, in violation of section 794.011(2), Florida Statutes (1987). (R-4) Pursuant to plea negotiations with the state, Murray pled guilty to one count of attempted capital sexual battery. (R-7) As part of the agreement, he was sentenced to prison for twenty years, the final ten years suspended and Murray placed on probation for that period. (R-11) The trial court conducted a full plea colloquy, accepted Murray's plea and adjudicated him guilty of attempted capital sexual battery. (T-11) No motion to withdraw the plea appears anywhere on the record.

Murray filed a pro se notice of appeal (R-19), and the public defender's office for the Second Judicial Circuit was appointed to handle the appeal. Appellate counsel thoroughly reviewed the record and transcripts of the plea agreement and sentencing, researched all possible issues which might be raised, and concluded that no meritorious issues appeared in the record which he, in good faith, could argue as constituting reversible error. Accordingly, appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), setting out the facts as they appeared on the record and concluding that no meritorious issues existed which could be argued to the court. The First District Court of Appeal permitted Murray to file a pro se brief, which he did, raising four points which he, Murray, believed mandated reversal of his conviction. These points alleged that the

trial court erred by: (1) allowing prosecution for capital sexual battery based upon an information rather than an indictment: (2) scoring points for victim injury on Murray's guidelines scoresheet; **(3)** exceeding the presumptive guidelines sentence pursuant to a plea agreement entered into by Murray: and **(4)** declining to refer Murray to the Mentally Disordered Sex Offender Program.

The district court ordered appellate counsel to brief these issues despite counsel's conclusion that they were without merit denying counsel's motion to allow him to withdraw as counsel and substituted new counsel. Instead, the district court again ordered counsel to brief the issues raised by Murray or demonstrate why they did not constitute reversible error.

Appellate counsel filed a notice of discretionary jurisdiction, and following the consolidation of this case with McDonald v. State, No. **74,537,** and the restyling of the case to reflect Murray's non-participation on this petition, this Court accepted jurisdiction because the district court's order affected a class of constitutional officers, to wit: The public defenders and assistant public defenders of the State of Florida. Though not consolidated, this case presents the same issues as those raised by Forrester v. State, No. **74,166.**

III. SUMMARY OF ARGUMENT

The order of the First District Court of Appeal in this case, as in Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989), requires court-appointed counsel to argue his case against his client. Such an action causes serious damage to a criminal defendant's constitutional right to counsel. Additionally, the procedure outlined by the district court requires court-appointed lawyers to violate this Court's rules of professional conduct.

IV. ARGUMENT

ISSUE PRESENTED

THE DISTRICT COURT'S NOVEL REQUIREMENTS FOR ANDERS BRIEFS VIOLATES AN INDIGENT CRIMINAL DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The order in this case, as well as the opinion in Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989), introduces novel, needless prerequisites for court-appointed appellate lawyers to perform in order to fulfill their obligations under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The district court's construction of "hoops" through which counsel must jump totally deprives an appellant of counsel in his behalf, requiring counsel to join forces with the state and argue against the client's interests.

In Anders, the Court ruled that, even in a situation where court-appointed appellate counsel viewed the appeal as frivolous, counsel was still required under the constitutional right to counsel to be an advocate on behalf of his client and to file a brief "referring to anything in the record that might arguably support the appeal." Anders, 386 U.S. at 744. This procedure still required counsel to act as an advocate rather

than amicus curiae, and would not force the court-appointed lawyer to "brief his case against his client." Id. at 745.[1]

The First District, however, misinterprets Anders and its progeny to require a detailed argument showing that the appeal is, in fact, wholly frivolous. Such a requirement flies in the face of the above-quoted language, exhibiting a lack of understanding of the Anders process and the quandary into which a court-appointed appellate attorney is placed when, after a conscientious examination of the record and a detailed research of the applicable law, he or she determines that the appeal is frivolous. The Anders decision carefully weighed the defendant's right to counsel on appeal against counsel's ethical obligations not to present frivolous arguments to the tribunal. In creating the Anders brief format announced in that decision, the Court struck a delicate balance between the two often-times conflicting duties. Counsel maintains her advocacy (as much as possible under the circumstances) for her client, yet

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[1] However, the fears expressed by Justice Stewart in his dissent in Anders appear to have been borne out in Forrester. Justice Stewart noted that the Anders opinion implied some degree of intellectual or ethical dishonesty in indigent appellate counsel. Anders v. California, 386 U.S. at 747. (Stewart, J., dissenting). This implication was made express in Forrester by the First District and the undersigned strongly resents the allegation that he has ever performed his duties in any manner besides ethically, honestly, and diligently. Indeed, as Justice Stewart stated, "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." Id. at 746. (footnote omitted) (Stewart, J., dissenting).

discharges her ethical duties to the court. To require additional disclosures and detailed legal arguments against her client tips this delicate balance, and destroys the indigent's right to appellate counsel. See Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987), cert. denied, __, U.S. __, 109 S.Ct. 541 (1988).

The district court here, and in Forrester, seeks to have the indigent's attorney become a staff lawyer for the court, to file a brief detailing the frivolity of the appeal "as an aid to the court in reaching any decision regarding whether the case is wholly frivolous. . . ." Forrester v. State, 542 So.2d at 1360. Yet this requirement runs contrary to this Court's opinion in State v. Causey, 503 So.2d 321 (Fla. 1987), and the holding in Anders, that once appellate counsel has concluded that the appeal is frivolous and has submitted the aforementioned required brief, the court must conduct an independent review of the proceedings to determine whether the appeal is frivolous.

> The requirement in Anders of submitting a brief stating that the public defender has found no reversible error even worthy of a good faith argument is intended to promote fair appellate review, not stifle it. This requirement was specifically meant to "induce the court to pursue all the more vigorously its own review." Anders, 386 U.S. at 745. This implies that some degree of independent review is required, and we disapprove Stokes [v. State, 485 So.2d 875 (Fla. 1st DCA 1986)] to the extent that it is inconsistent with the instant opinion.
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> * * *
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> 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.
>
> Dissenting in Stokes, Judge Barfield stated that "the better policy is for the appellate court to review the entire record in each case in which an Anders brief has been filed by appellate counsel, whether or nor the appellant files a pro se brief." 485 So.2d at 877 (Barfield, J., dissenting). We agree that this is the better policy. While courts should not assume the role of appellate counsel, reversible error should not be ignored simply because an indigent appellant or a public defender failed to point it out.

State v. Causey, 503 So.2d at 322-23. See Anders v. California, 386 U.S. at 744; Pension v. Ohio, 488 U.S. ___, 109 S.Ct. 346, 102 L.Ed. 300, 310 (1988). Once the Anders brief is filed, as it was here, detailing the record and noting the potential issues on appeal, along with supplying citations to controlling authority on those issues, the court -- not counsel -- must proceed to conduct an independent review of the record to determine if the appeal is wholly frivolous. The district court must do its own work at this stage. While the Anders brief may act to serve as a guide to the appellate court in order to conduct its own independent inquiry into the otherwise "cold record," Anders, 386 U.S. at 745, it may not be a substitute for that review. See McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440, 463 n.3 (1988) (Brennen, J., dissenting). Only after the court has conducted that independent review can it require additional briefs from appellant's counsel -- not to condemn the appellant and his issues on appeal, but at that point to support those issues.

It appears from the district court's order in this case that the court has not undertaken that independent review prior to its request for an additional brief; rather the opinion in Forrester clearly shows that it wants the appellant's attorney to take an active part in that review by briefing the case in detail, against his client if necessary, and by seeking an additional statement from trial counsel as to the frivolity of the appeal. This is simply not the independent review required by Anders or Causey. The court has "changed the adversarial process into an inquisitorial one" by having the defendant's current and former attorneys joining the forces of the state and working against [their] client." Robinson v. Black, 812 F.2d at 1085.

A proper reading of the United States Supreme Court Cases since Anders reveals no requirement that appellate counsel follow the procedure conjured up by the first district in Forrester and this case. Initially, McCoy does not hold, as the first district stated, that Anders requires the procedure outlined in Forrester. Rather, that case simply holds that the federal constitution and Anders permit the procedure dictated by the State of Wisconsin. Additionally, the procedures promulgated by the district court in Forrester go far beyond that envisioned in McCoy. The Wisconsin rule in that case was more in the nature of putting the court on "notice" regarding the non-meritorious nature of the case and the facts, cases, or statutes on which counsel might have based that conclusion. It does not require, as the Forrester court mandated, that counsel

"engage in a protracted argument in favor of the conclusion reached." McCoy, 100 L.Ed.2d at 454, quoting from McCoy v. State, 137 Wis. 90, 403 N.W.2d 449, 454 (1987).

Nor does it require a statement from appellate counsel that he has consulted with the trial counsel who now agrees that the appeal is frivolous or "a satisfactory explanation of why such concurrence could not be obtained." Forrester, 542 So.2d at 1361. Such a statement of concurrence does nothing more than require a second "no-merit letter" of the type condemned in Anders. See Carter v. State, 14 FLW 2405 (Fla. 1st DCA October 13, 1989), slip op. at 4 (Barfield, J., dissenting). As stated by Justice Brennen in his dissent in McCoy:

> [D]efense 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 [v. Dodson, 454 U.S. 312, 323-24 (1981)].

McCoy, 100 L.Ed.2d at 459 (Brennen, J., dissenting).

If trial counsel does not concur, then appellate counsel, in order to provide the "satisfactory explanation" of why such concurrence could not be obtained, is forced to divulge "work product" discussions with trial counsel which should not be disclosed. See Colonial Penn Ins. Co. v. Blair, 380 So.2d 1305 (Fla. 5th DCA 1980).

There is plainly no such requirement under Anders or McCoy and simply no need to require this disclosure in an Anders brief. Instead such a requirement places an additional burden on an appellate public defender, both in terms of ethics and his already over-extended workload.

> We are convinced that [indigent defendants] receive [effective assistance of counsel] when one attorney, in exercising professional competence and judgment, determines that there are no non-frivolous issues to raise on appeal. That is, in fact, the same exercise of judgment that takes place when an attorney finds one arguable issue to raise and there are no other non-frivolous issues presented by the case: we see no constitutional distinction between those situations.

State v. Horine, **669** P.2d 797, 805 (Ore. 1983) (emphasis in original; footnote omitted). See Jones v. Barnes, **463** U.S. 745, 103 S.Ct. **3308,** 77 L.Ed.2d 987 (1983). Appellate public defenders, experienced in handling the quirks of appellate practice, including preservation of issues, harmless or invited error, and waiver, are more likely to realistically and accurately see issues in terms of whether they are frivolous, while trial attorneys often view the issues with the passion stirred by the heat of trial. As recently stated by Judge Barfield:

> [T]he language of Forrester is . . . in my judgment, wholly unreasonable and unworkable. Forrester seems to call for nothing short of capitulation by either the trial counsel or appellate counsel as to the merits of the trial lawyer's position on the record. While some trial lawyers may confess to being frivolous on the record below, it is doubtful that this will often occur. . . . To propel the language of that opinion into standards for all Anders cases simply clogs the appellate process unnecessarily. There are adequate safeguards already existing for the Anders review. State v. Causey, 503 So.2d **321** (Fla. 1987).

Carter v. State, supra, **14** FLW at 2406 (Barfield, J., dissenting).

Adequate safeguards do already exist in the state appellate process and no abuse of the Anders procedure has been shown by the first district. The Attorney General in Forrester has agreed that no widespread problem exists in this state's

Anders procedure. See Brief of Respondent in Forrester, pp. 5, 15, 19. The requirement of Anders, concerning the type of brief to be filed (not one in which the attorney must argue the case for the state) and the independent review of the record by the appellate court pursuant to Causey, assure the indigent defendant that his case receives careful review sufficient to meet state and federal constitutional standards. Should the appellate court or the defendant find the representations of appellate counsel lacking in its professional standards, then other adequate remedies are available to correct that isolated problem. Until any of the isolated problems become widespread, there is no need to tamper with the Anders procedure and cause considerable mischief to the appellate system and an unnecessary burden on our appellate advocates.

Accordingly, the undersigned assistant public defender urges this Court to reject as unnecessary and unconstitutional the procedures set forth by the First District Court of Appeal in Forrester, and followed in this case. In so doing, the Court should reaffirm the principles of Anders and Causey and thereby assure indigent appellants the effective assistance of counsel, free from any requirement to argue the case against the client.

V. CONCLUSION

Based upon the foregoing cases, authorities and policies, the undersigned assistant public defender respectfully requests this Honorable Court to quash the order of the First District Court of Appeal in Murray v. State, Case No. **88-1393.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner on the Merits has been furnished by hand-delivery to Edward C. Hill, Assistant Attorney General, The Capitol, Tallahassee, Florida, **32302;** and a copy has been mailed to Mr. Paul Terry Murray, **#902439,** Union Correctional Inst., Post Office Box **221,** Raiford, Florida, **32083,** on this 2d day of November, **1989.**

LAWRENCE M. KORN