OA 4-2-90 047

IN THE SUPREME COURT OF FLORIDA

IN RE: ORDER ON PROSECUTION OF CRIMINAL APPEALS BY THE TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER

(PINELLAS)	CASE NO. **74,574**
(MANATEE)	CASE NO. **74,580**
(HILLSBOROUGH)	CASE NO. **74,629**
(CHARLOTTE)	CASE NO. **74,630**
(LEE)	CASE NO. **74,631**
(COLLIER)	CASE NO. **74,679**

On Discretionary Review From the Florida District Court of Appeal, Second District

REPLY BRIEF OF COLLIER COUNTY, FLORIDA

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SUMMARY OF ARGUMENT

The principal cases cited by the Respondent in its Initial Brief, in regard to the due process issues raised by the Second District Court of Appeals Order of May 12, 1989, do not support the sua sponte issuance of said Order by the Court. Rather, the precedents existing prior to the order all provided for some degree of notice and opportunity to be heard by the counties as to judicial appointments of private counsel to handle indigent criminal appeals.

The Second District Court of Appeal's order denied due process to the counties, and said order must be quashed since it violates Art. I, §9 of the Florida Constitution.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL'S ORDER OF MAY 12, 1989, VIOLATES THE DUE PROCESS RIGHTS OF THE COUNTIES BY AUTHORIZING AN "EN MASSE" WITHDRAWAL OF THE TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER FROM CRIMINAL APPEALS CASES WITHOUT HAVING AFFORDED NOTICE AND HEARING TO THE COUNTIES, CONTRARY TO ESTABLISHED PRECEDENTS.

It is the position of Collier County that the counties in this litigation are denied due process of law by the May 12, 1989, Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender. _____ So. 2d. _____. The Initial Brief of the Respondent Tenth Judicial Circuit Public Defender takes issue with this allegation arguing, essentially, that the Order was a proper administrative order designed to handle the criminal caseload of the appeal court and that the county has already been given two prior opportunities to be heard on the same subject. (Initial brief of Respondent Tenth Judicial Circuit Public Defender at page 4). Collier County replies that the issue hinges on whether fundamental fairness has been afforded to the counties in this case to be determined by considering relevant precedents and assessing the several interests that are at stake. Lassiter V. Department of Social Services, 452 U.S. 18, 24-25 (1981).

A review of the relevant precedents and the interests at

stake in this matter may begin with Escambia County v. Behr, 384 So. 2d. 147 (Fla. 1980). In Escambia County, this court held that a trial court could appoint private counsel to represent an indigent defendant in lieu of the public defender. However, Escambia County involved appointments in only a handful of cases. Escambia County at 148. Escambia County is also significant in that concurring Chief Justice England forecast the potential dramatic financial implications for counties if free substitution of private attorneys for public defenders were allowed to take place. Justice England stressed that counties should be able to challenge evidence of excessive caseload presented by the public defender at a proceeding at the trial level. Escambia County at 150.

Dade County v. Baker, 362 So. 2d. 151 (Fla. 3d DCA 1978) is important because Judge Hubbart's dissent was adopted as the rationale for the holding in Escambia County. Escambia County at 150. Judge Hubbart opined that a reading of Sections 27.53(2), and 925.035, Florida Statutes (1977), indicated that a trial court had the authority to appoint members of the private bar to represent insolvent criminal defendants. Baker at 155 and 156. However, the Judge found that Dade County had standing to bring a petition in the case in regard to these appointments of private counsel. Baker at 159. The Judge also limited the reach of his opinion by commenting:

> The Order under review permits the public defender to withdraw as counsel, and appoints a special

> assistant public defender to represent a particular insolvent defendant on appeal in a single felony case. It does not allow the public defender to withdraw en masse (emphasis added) from all his insolvent criminal appeals arising out of Dade County and appoint private counsel to take over such cases. Nor is there any showing on this record that this has been accomplished in whole or in part in prior cases. If it did, an entirely different question would be presented. To cast this case in such dramatic terms is to ignore the plain language of the order under review. Baker at 159.

Since Judge Hubbart's dissenting opinion in Baker became the rationale for the holding in Escambia County, Escambia County does not stand for judicial approval of wholesale withdrawal by the public defender from appellate cases due to overload, as is argued by the Tenth Judicial Circuit Public Defender. (Respondent Moorman's Initial Brief at page 8). Rather, Escambia County and Baker envisioned a case by case determination by trial judges as to whether private counsel should be appointed to represent insolvents on appeal. It is implicit in the reasoning of those cases that such a case by case determination would afford the counties due process by providing an opportunity to be heard on each occasion.

Two 1986 appellate cases show the application of the Baker-Escambia County rule. In Kiernan v. State, 485 So. 2d. 460 (Fla. 1st DCA 1986) the Eighth Judicial Circuit Public Defender was allowed to withdraw from eight cases although the original motion was for a blanket withdrawal from 100 cases. Kiernan at

461. In Schwarz V. Cianca, 495 So. 2d. 1208 (Fla. 4th DCA 1986), the Appellate Court approved withdrawal of the public defender from representing juvenile cases in Circuit Court on the basis that the county had not rebutted the evidence presented by the public defender alleging excessive caseload. Once again, the county had been furnished an opportunity to be heard on the matter.

In Haggins v. State, 498 So. 2d. 953 (Fla. 2d DCA 1986), the Appeal Court denied the public defender's motion to withdraw from 247 pending criminal appeals. In deciding the case, the Second District Court of Appeals invited responses from the counties. Haggins at 953. The public defender was directed to make motions for withdrawal in the Circuit Courts. The Court specifically recognized that a case by case determination would allow for a better determination as to the ability of the public defender to handle his caseload and the means by which substitute counsel, if appointed, could be compensated. Haggins at 954.

In Grube V. State, 529 So. 2d. 789 (Fla. 1st DCA 1988), the Appellate Court recognized the increased pressure on the system of public defender representation caused by the growth in crime and resulting jail overcrowding problems. Grube at 790. In response to this situation, the Court allowed the public defender to withdraw in up to 100 new cases. However, this decision was made after the matters had been heard at the trial level and were appealed. The Court also established briefing schedules for other

pending appeal cases as opposed to granting withdrawal.

The pattern that emerges from the cases which we have reviewed is that the Florida Appellate Courts had consistently followed the mandate of Baker and Escambia County which requires a case by case determination at the trial level as to the propriety of withdrawal by the public defender from appeals cases. As the crime problem has worsened, the pressure on the appellate courts to extend the Escambia County rule to permit a blanket order approving public defender withdrawal from appeals cases en masse has greatly increased. However, it is only when we arrive at the Second District Court of Appeal's Order on Prosecution of Criminal Appeals bv the Tenth Judicial Circuit Public Defender, _____ so 2d. _____ (Fla. 2nd DCA 1989) that, for the first time, we find judicial approval of an en masse public defender withdrawal from the appellate cases of potentially thousands of indigents. The Order was followed by Terry v. State, 547 So. 2d. 712 (Fla. 1st DCA 1989), where motions to withdraw were approved but in which the court refused to hear the arguments of the county.

The Second District Court of Appeal's Order of May 12, 1989 is basically the result of a letter from the Public Defender claiming to be overloaded with cases and a recommendation of the Florida Judicial Counsel. Order at 10. This is contrary to the Florida concept of due process, even in non-criminal situations where it has been described as contemplating reasonable notice and

an opportunity to appear and to be heard. Sheffey v. Futch, 250 So. 2d. 907, 910 (Fla. 4th DCA 1971). The Respondent urges that due process is satisfied, even though the counties were not heard on the present order, because the counties had participated in Haggins and in In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 523 So. 2d. 1149 (Fla. 2d DCA 1987). (Initial Brief of Respondent Tenth Judicial Circuit Public Defender at page 12). This argument ignores that the cases previously cited, with the exception of Terry, all involved some opportunity by the counties to be heard on motions for withdrawal. Judge Parker, dissenting in Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, _____ So. 2d. _____ (Fla. 2d. DCA 1989), pointed out that the issuance of the order without county participation ignored the procedures in Haggins and violated due process. Order at 12. Judge Parker found this to be especially true in light of the considerable financial impact of the majority's order on the counties. Order at 13.

The Order of the Second District Court of Appeal should also be quashed because it is based on an impermissible use of the Court's inherent judicial power. In Rose v. Palm Beach County, 361 So. 2d. 135 (Fla. 1978), this Court commented that the doctrine of inherent power should be invoked only in situations of clear necessity. Extreme caution was advised in the use of this power so that the courts' zeal in the protection of their prerogatives would not lead them to invade areas of responsibility

confided to the other branches of government. Rose at 138. In this case the Second District Court of Appeal was commendably eager to protect the rights of indigents to be represented on appeal. However, it should have first conducted a hearing, at which all parties including the counties would be present, so as to determine whether established methods had failed or an emergency had arisen. Those findings are legally required prior to the exercise of inherent power. See In re Salary of Juvenile Director, 87 Wash. 2d. 232, 250, 552 P. 2d. 163, 173 (Wash. 1976) which is cited at page 138, footnote 9 of Rose.

CONCLUSION

The Order of the Second District Court of Appeal of May 12, 1989, has denied due process of law to the counties in violation of Art. I, §9, Fla. Const. and Fla. R. Crim. P. 2.020(c). Collier County respectfully requests that said order be quashed.

Respectfully submitted,

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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 the following persons, on this 16th day of March, 1990.

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