IN THE SUPREME COURT OF FLORIDA

IN RE:

APPELLATE COURT RESPONSE
TO ANDERS BRIEFS,

76,483

CASE NO. 76,~~881~~

RESPONDENT WILLIAMS' BRIEF ON THE MERITS

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I PRELIMINARY STATEMENT

This is a state appeal from the decision of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990).

Before the case was restyled, the state was the petitioner and COUPE, FENNELL and WILLIAMS were the respondents. This brief is being filed on behalf of respondent WILLIAMS. A merit brief was previously filed on behalf of respondents COUPE and FENNELL. All respondents agree with the state that this cause does not address the merits of the cases, but rather, seeks a constitutionally acceptable balance between the defendant's right to a meaningful appeal and the judicial system's interest in avoiding unnecessary labor for the courts. Their disagreement lies in what the constitutional balance consists of.

As the issues which pertain solely to COUPE and FENNELL were fully argued in the merit brief filed on their behalf, those arguments will be omitted here.

Petitioner's brief on the merits will be referred to as "PBM" and its reply brief as "RB." Respondents will be referred to as such or by name.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's version of the case and facts as reasonably accurate.

III SUMMARY OF ARGUMENT

While the state sees the issue as much broader, all respondents see the issue here as whether the improper imposition of court costs can be raised in an Anders brief. They see Coupe's probation condition, which imposes another cost, as legally indistinguishable from court costs. The alias question raised in Fennell's brief was not intended to raise a meritorious issue, but merely to comply with the admonition of Forrester to draw attention to anything that might "arguably support the appeal." All respondents believe a Ree issue is not properly raised in an Anders brief, and thus, that Williams was improperly joined in this appeal.

Respondents believe the problem of dual representation is a false issue, that relatively few defendants file pro se appellate briefs, that the state has failed to demonstrate otherwise, that the district court has the authority to control the timing and number of briefs to be filed, and that such control is appropriately exercised on a case-by-case basis.

The issues that really matter to a defendant are those directly related to the judgment and sentence, and it is to those issues that the Anders procedure is directed. As for the heart of the matter here, the issue of judicial economy,

respondents believe it is a reasonable balancing of their constitutional right to appellate due process against the judiciary's interest in orderly and not-unduly-delayed appeals, that the issue of court costs, and similar minor sentencing issues, may be raised in Anders briefs. The interests of judicial economy cannot usurp respondents' right to procedural due process, and they respectfully request that this court permit their Anders briefs to stand.

IV ARGUMENT

ISSUE PRESENTED (RESTATED)

WHETHER ARGUMENT ON MINOR SENTENCING MATTERS PRECLUDES ANDERS REVIEW PROCEDURES IN CRIMINAL APPEALS.

This is an appeal from the decision of the First District Court of Appeal in Coupe v. State, 564 So.2d 1199 (Fla. 1st DCA 1990), which certified the following as a question of great public importance:

> What, if any, issues may be raised by counsel for appellant in an initial brief without losing appellant's right to the Anders procedure, including permission for appellant to serve his own pro se brief and an examination of the entire record by the appellate court for the existence of reversible error?

This case also raises the issue of what constitutes a "wholly frivolous" appeal which triggers the appellate review procedures of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Each of the three respondents filed Anders briefs, each of which briefly argued a minor sentencing matter, such as the imposition of court costs without notice and hearing (Coupe and Fennell), the addition of a probation condition to the written order, which was not orally pronounced (Coupe), and the failure to enter a written guideline departure order contemporaneously (Williams). The state moved to strike each Anders brief on the ground that by arguing any issue, the appeals were not wholly frivolous, and as they had some merit, Anders review was precluded.

All respondents agree that Anders and its progeny have used phrases such as "wholly frivolous" and "no merit" to describe the typical Anders case. No case has yet defined exactly what constitutes a wholly frivolous appeal, however, for purposes of triggering the Anders procedure. That is the issue here.

All respondents believe that, while there was no reason at first to consider it so, the use of the no merit/wholly frivolous language was somewhat careless. In none of the cases cited by the state did the questioned language occur in the context now presented to this court. None of the cases cited by the state addressed the issue here of whether, in an appeal which is mostly without merit, but in which there is a minor sentencing issue, an Anders brief can be filed. Rather, in all the cases cited by the state, defense counsel took the position, justifiable or not, that the appeal was indeed wholly without merit.

In its opinion below, the First District Court said:

> It is obvious that there are countervailing policy arguments which can be made on behalf of both parties. The state contends that the rationale of Anders is clear enough and applies only where counsel for appellant can make no argument for reversible error. Appellants argue the unfairness of losing the right to Anders review simply because counsel is able to identify some relatively minor sentencing issue.

Coupe, 564 So.2d at 1200. Without much in the way of explanation, the First District took the position of respondents, that

is, raising minor sentencing issues does not preclude the filing of an Anders brief.

The state has three main complaints to filing an Anders brief which raises any sort of meritorious issue. The state called the first "abuse of discretion" (PBM-9). Respondents prefer to call it the judicial economy issue. The state's second complaint concerns dual representation. The last is the state's perceived conflict between the district court opinion below and the provisions of section 924.06, Florida Statutes.

Dual representation. The state complains that permitting respondents to raise a meritorious issue in an Anders brief and also permitting them, in accordance with Anders procedure, to file pro se briefs amounts to dual representation. Respondents contend strongly that this is a false issue.

First, as the state noted, no rule, statute or caselaw forbids dual representation. See State v. Tait, 387 So.2d 338 (Fla. 1980). On the other hand, defendants have no right to dual representation. Whitfield v. State, 517 So.2d 23 (Fla. 1st DCA 1987), review den. 525 So.2d 881 (Fla. 1988). The fact a defendant has no right to, that is, that he cannot demand, dual representation does not preclude the district court, in its discretion, from permitting pro se briefs, if it so chooses.

The state has not even made a convincing case that dual representation is a genuine problem, and not merely an illusory one. Whether dual representation is truly a problem which needs to be addressed by this court would depend in substantial

part on the factual question of how often defendants file pro se briefs after their appointed attorneys have filed Anders briefs. If only one Anders defendant in ten files a pro se brief, this court may still wish to address the issue, but it would hardly be as compelling a problem as it would be if nearly every Anders defendant filed a pro se brief. The record below does not contain any information from which could be determined what percentage of Anders briefs are in fact followed by pro se briefs. It is noteworthy that no pro se brief has been received in any of the three cases herein appealed (PBM-14, n.12). Respondents believe that the district court has the authority to control the timing and number of briefs to be filed, and that such control is appropriately exercised on a case-by-case basis.

Contrary to the state's argument, the district court's denial of the state's motion to preclude filing pro se briefs was somewhat less than an affirmation by the court that it would actually accept a pro se brief, no matter when it was filed. Moreover, as the state typically files no response to Anders briefs, the state is not compelled to answer more than one brief, even when a pro se brief is filed. So, permitting a pro se brief does not typically cause additional work for the state, assuming additional work is of concern to the state. The state did file a response to the Anders brief in Williams. As will be explained fully later, respondent Williams believes his own case is an atypical aberration which was handled incorrectly by the district court.

Judicial economy. The far more troublesome problem here is the judicial economy issue. When a merit brief is filed, the appellate court may rely on defense counsel's assessment of which issues are meritorious and review only the issue or issues argued by defense counsel. On the other hand, when an Anders brief is filed, the appellate court is obliged to review the entire record for errors. State v. Causey, 503 So.2d 321 (Fla. 1987). All things being equal, an Anders brief is naturally going to be more trouble for the court because it is obliged to review the entire record for error which may not have been previously identified. On the other hand, the court's interest in judicial economy must be balanced against the defendant's right to meaningful appellate review. At some level, this issue will reach the level of whether the defendant is receiving constitutional due process and right to counsel, and it is at the constitutional level that this court must address the issue.

Far from wasting judicial resources by pointing out a minor, but meritorious, issue in an Anders brief, counsel is attempting to conserve judicial resources while at the same time preserving respondents' opportunity to argue any substantive issues of merit they might find, subject to the thorough judicial scrutiny the appellate court properly gives no merit briefs. Further, as counsel is obliged to point out any issues of possible merit, he or she does only what is required by pointing out these minor sentencing issues.

This truth must be addressed - while it is inappropriate for a court, for example, to impose costs without notice, and this should be corrected, it is a small comfort to the defendant to raise the issue of court costs, but thereby, to deny him the independent judicial review that comes with a "no merit" brief, and deny him the opportunity to raise any issue that counsel might miss. The issues that really matter to a defendant are those directly related to the judgment and sentence, and it is to those issues that the Anders procedure is directed. The interests of judicial economy cannot usurp respondents' right to counsel and procedural due process, and they respectfully request that this court permit their Anders briefs to stand.

Conflict between section 924.06 and Anders. Section 924.06(3), Florida Statutes, provides that a defendant who pleads guilty or nolo contendere without an express reservation of the right to appeal has no right to direct appeal. This provision was added to the statute in 1976. Ch. 76-274, § 7, Laws of Florida. On the other hand, sections 924.06(1)(d) and (e) provide that a defendant has the right to appeal from an illegal sentence or a sentence which departs from the guidelines. This court has previously limited section 924.06(3) to pre-plea matters, Robinson v. State, 373 So.2d 898 (Fla. 1979), which leaves sentencing issues appealable. The state conceded that none of the respondents "directly challenged his conviction" (PBM-4).

While section 924.06(3) is no bar to the raising of sentencing issues on direct appeal, it is not clear how the subsection is to be reconciled with the requirements of Anders, decided nine years earlier in 1967. Anders requires appointed counsel to file a brief which draws the reviewing court's attention to anything which might arguably sustain the appeal. As section 924.06 does not address the responsibility of counsel, the Anders requirements for counsel presumably remain intact and do not conflict with the statute.

The reviewing court's responsibilities, however, are another matter. It remains for this court, and perhaps the United States Supreme Court to decide whether, in relieving appellate courts of the responsibility to review the whole record for error, section 924.06(3) is constitutional. The statute's facial constitutionality is not at issue here, however, as the statute expressly permits appeal of sentencing issues, notwithstanding the entry of a plea of guilty or nolo contendere, and all respondents raised only sentencing issues in their Anders briefs.

Ree issue. Williams, alone of the respondents, raised a Ree issue (whether written departure order was entered contemporaneously with imposition of sentence) in his Anders brief. Ree v. State, 565 So.2d 1329 (Fla. 1990) (decision on rehearing). In the decision below, the First District Court approved raising a Ree issue in an Anders brief. All respondents believe the district court was incorrect on this point. They believe the First District's joinder of a Ree issue in this

appeal stems, at heart, from the district court's misapprehension of Ree and its consequences, both in general and as to prospectivity.

In Ree, this court held that when the trial court departs from the presumptive guideline sentence, the written order must be entered contemporaneously with the imposition of sentence. Ree itself does not expressly state what relief is to be granted a defendant whose departure sentence was not supported by a contemporaneous written order. All respondents believe the key to the relief to be granted is contained in the supreme court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990). In Pope, this court said that, where the trial court failed to enter written reasons, on remand, it could impose only a guidelines sentence and could not again depart. Respondents believe this policy will be extended to written reasons which are untimely under Ree.

A second issue is what Ree means when it says it is prospective only. This issue is presently pending a decision on jurisdiction in this court. Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990), pending decision on jurisdiction, no. 76,616. See also Henderson v. State, ____ So.2d ____, 15 FLW D2383 (Fla. 1st DCA Sept. 18, 1990), decision on jurisdiction pending, no. 76,891; Williams v. State, 565 So.2d 838 (Fla. 1st DCA 1990), decision on jurisdiction pending, no. 76,677; Blair v. State, 559 So.2d 349 (Fla. 1st DCA 1990), review granted, no. 75,937. Traditionally, "prospective only" decisions applied to "pipeline" cases. Pipeline cases are cases which

are not final, by trial or on appeal. Reed v. State, 565 So.2d 708 (Fla. 5th DCA 1990); Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986). As it is not final, Williams' is a pipeline case.

The state argued in a footnote (PBM-6, n.5) that the Ree issue had been resolved against Williams, but this is an exaggeration, as the Brown decision and the others are contrary to extant caselaw defining what prospective application means, and all are presently pending before this court.

Of course, this court need not decide the Ree issue in this appeal. It is enough that, were respondents correct on reading Ree and Pope together, and on the traditional view of prospectivity, then the relief to Williams on the Ree issue would be remand for resentencing within the guidelines. This would be substantial relief for Williams, whose departure sentence was life imprisonment. If the district court shared this view of the caselaw, it could hardly find Ree to be an appropriate issue to raise in an Anders brief. This is particularly true since the district court expressly named the validity of guideline departure sentences as an issue which could not be raised in an Anders brief. All respondents believe, therefore, that the district court must have a different view of the issue, either in general or as to prospectivity, in which Williams is entitled to no substantial relief. They believe this view is mistaken.

Other issues raisable in Anders. The state has raised the specter of having to litigate what kinds of errors may be raised in Anders briefs (RB-2), and points to the district

court's treatment of the Ree issue as an example of how broad Anders issues could become. All respondents disagree with the district court's treatment of the Ree issue, and believes the issues raisable in Anders brief to be limited to issues such as the improper imposition of court costs and discrepancies between oral and written probation conditions. There should be no floodgate of litigation over these types of issues. As for the other types of issue which the state fears may be raised in Anders briefs if the opinion below is affirmed, respondents believe that issues such as the propriety of habitual offender sentencing, and proof of use of a firearm, sufficient to justify a mandatory minimum sentence (see RB-3-4), are substantial issues which may not be raised in an Anders brief.

Other issues in Williams. While it is not truly pertinent to the issue before the court, undersigned counsel believes the second issue in Williams' Anders brief - the propriety of the guidelines departure - was arguable on direct appeal.

Williams pled to second-degree murder and aggravated child abuse in the death of a 20-month-old child entrusted to his care. Williams had no criminal record, but the trial court departed from the guidelines recommendation of 12 - 17 years and imposed a sentence of life imprisonment. The reasons for departure were the vulnerability of the child due to his tender age, and abuse of custodial authority. Neither of these is a valid reason for departure on the child abuse conviction, see Hall v. State, 517 So.2d 692 (Fla. 1988), and it is at least arguable that they do not support departure where the abuse

results in death. See Davis v. State, 517 So.2d 670 (Fla. 1987).

To summarize, while the state sees the issue as much broader, all respondents see the issue here as whether the improper imposition of court costs can be raised in an Anders brief. In their view, Coupe's probation condition, the imposition of yet another cost, is legally indistinguishable from the court costs issue. The alias issue raised in Fennell's brief was not intended to raise a meritorious issue, but merely to comply with the admonition of Forrester to draw attention to anything that might "arguably support the appeal." All respondents believe a Ree issue is not properly raised in an Anders brief, and thus, Williams was improperly joined in this appeal.

Respondents believe the problem of dual representation is a false issue, that relatively few defendants file pro se appellate briefs, that the state has failed to demonstrate otherwise, or to demonstrate that it is a substantial problem when pro se briefs are filed, that the district court has the authority to control the timing and number of briefs to be filed, and that such control is appropriately exercised on a case-by-case basis.

The issues that really matter to a defendant are those directly related to the judgment and sentence, and it is to those issues that the Anders procedure is directed. As for the heart of the matter here, the issue of judicial economy, respondents believe it is a reasonable balancing of their constitutional right to counsel and appellate due process against the

judiciary's interest in orderly and not-unduly-delayed appeals, that the issue of court costs, and similar minor sentencing issues, may be raised in Anders briefs. The interests of judicial economy cannot usurp respondents' right to counsel and procedural due process, and they respectfully request that this court permit their Anders briefs to stand.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondents request that this Court answer the certified question by permitting minor sentencing issues to be raised in an Anders brief. Respondents believe, however, that a Ree violation would result in substantial relief to the defendant, thus it is not a minor sentencing issue, and should not be raised in an Anders brief. With some reservation due to the wide array of cases in which Anders briefs are filed, and assuming representation of a variety of interests in the decision-making process, respondents do not oppose the state's suggestion for rulemaking procedures to cover Anders procedures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and copies have been mailed to Mr. Nickolas Petersen, P.O. Box 873, Shalimar, Florida 32579 and Mr. Samuel Williams, # 116603, Cross City Correctional Institution, P.O. Box 1500, Cross City, Florida 32628, this 19 day of November, 1990.

KATHLEEN STOVER