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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 76,483

DAVID COUPE, et al.,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

This appeal does not address the merits of the cases. It seeks a constitutionally acceptable balance between a defendant's right to a meaningful appeal and society's right to a criminal justice system not thwarted, in part, by unnecessary appellate court labor. The State respectfully suggests this balance should be reached through rulemaking that specifies general procedures for "Anders [1] appeals", just as this Court has specified general procedures for appeals from summary denial of postconviction relief.

When discussed collectively, Respondents will be referred to as such, otherwise they will be noted by their last name. Petitioner will be referred to as the State. The record in each case incorporates the transcript of proceedings before the trial court, so that all citations to the record will show the

[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Respondent's name followed by "R" and the page number. Note that the pages in each appendix have been re-numbered; the new numbers do not necessarily correspond to the original.

STATEMENT OF THE CASE

The posture of this appeal reflects the commonalities of the three consolidated cases. Coupe pled no contest to two counts of fraudulent use of a credit card (Coupe R 78); and Williams, to second degree murder and aggravated child abuse (Williams R 3). Fennell was convicted for possession of a firearm by a convicted felon (Fennell R 27).

Anders briefs were filed by each Respondent's appointed counsel. Counsel generally stated that no good faith, meritorious argument could be brought against the convictions and sentences.

Significant to this appeal, all Anders briefs included substantive argument as to secondary issues raised by sentencing: Coupe and Fennell, as to costs imposed without notice; Williams, as to delay between sentence pronouncement and filing of departure reasons. Fennell also argued the propriety of evidence as to past use of aliases. The State moved to strike the "no merit" portions of each brief. When the respective deadlines for pro se initial briefs passed, the State moved to preclude their filing in Coupe and Williams. The State emphasized the impropriety of "dual representation".[2]

The First District consolidated disposition of the State's motions and denied them. However, the court certified the following question of great public importance:[3]

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[2] In the order under review, the First District also granted Fennell permission to file a pro se initial brief (slip opinion, p. 4).

[3] The court also concluded the question appeared to expressly affect a class of constitutional officers (slip opinion, p.4).

> [W]hat, 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. (slip op., App. A, p.3).

The challenged opinion was issued July 25, 1990. (See App. A). The State invoked this Court's discretionary jurisdiction, to review questions certified to be of great public importance, by notice served on August 9, 1990.

STATEMENT OF THE FACTS

For clarity, the State will present the facts of each case separately. Given that no Respondent directly challenged his conviction, the facts admitted or adduced into evidence are not recounted.

Coupe

Coupe pled nolo contendere to two counts of fraudulent credit card use (Coupe R 78). He received five years imprisonment for Count I, followed by five years probation for Count II (Coupe R 80-2). Court costs, fines, restitution and a payment to "First Step, Inc." were imposed as probation conditions (Coupe R 82, items 9-12).

Appellant counsel filed an Anders brief (App. B, p.1-13) as to the propriety of Coupe's plea; no challenge to most terms of his sentence was made. Nevertheless, the Anders brief argued (App. B, p.11) that the statutorily mandated court costs and one written probation condition (payment to First Step, Inc.) were improperly imposed.

The State moved to strike the Anders portion of Coupe's initial brief on the grounds that mixed briefs were improper and that dual representation through double-briefing would occur. (See App. B, p.14-17). The motions panel of the First District deferred the State's motion to strike to the panel on the merits. (See App. B, p.19 [order dated May 25, 1990]).

Significantly, Coupe had already been authorized to serve a pro se initial brief (See App. B, p.18 [order dated April 26, 1990]). That order did not direct Coupe's appellate counsel to withdraw and did not authorize further pro se participation by Coupe. The court's May 25th order re-stated Coupe's opportunity to serve a pro se initial brief. Coupe failed to do so. The State then moved to preclude filing of the pro se brief. (App. B, p.20-23). That motion was denied in the challenged order, with no deadline for service of the pro se brief. [Note: The court's order of April 26th allowed Coupe only 30 days to serve his initial brief. The challenged order was issued July 25th, or two months after the deadline].

Williams

Williams pled[4] no contest to second degree murder and aggravated child abuse (Williams R 3), for killing a 20-month old infant entrusted to his care. (Williams R 44). He received a departure sentence of life imprisonment. (Williams R 5). The departure reasons - infancy of victim and Williams' position of custodial authority or control - were announced at sentencing on

[4] The plea was allowed only because the arresting officer suffered a severe stroke and could not testify (Williams R 43).

May 30, 1989 (Williams R 47), and filed in written form only three days later (Williams R 10).

Counsel's amended initial brief (App. C, p.1-12), invoked Anders and conceded no error had been made as to the reasons for departure and length of sentence. It did, however, argue (App. C, p.10) that resentencing was required due to the court's failure to provide contemporaneous written departure reasons.[5]

The State answered (App. C, p.13-24) the second issue in its brief served January 19, 1990. Nevertheless, the First District authorized a pro se initial brief, apparently on both issues, by its order dated April 10, 1990. (See App. C, p.25). Williams was given 30 days to serve his brief. A month after that deadline, the State moved to preclude filing of the pro se brief, on the grounds that Williams did not comply with the court's order. (See App. C, p.26-28). That motion was denied in the challenged order.

Fennell

Fennell was tried and found guilty for possession of a firearm by a convicted felon (Fennell R 31), and sentenced to five years in prison (Fennell R 33). The initial brief submitted by counsel invoked Anders, but expressly argued that evidence of aliases Fennell used while a juvenile was "improper". (App. D, p.14). It further stated that the State "in no way showed how

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[5] Williams was sentenced May 30, 1989 (Williams R 47). Therefore, this issue has been resolved against him. Ree v. State, 15 F.L.W. S 395 (Fla. July 19, 1990) (requirement of simultaneous departure reasons prospective only). Except for its value as an example of Anders appeal procedures used by the First District, Williams could be severed and remanded for consistent proceedings.

the use of an alias was relevant to the possession of a firearm". (App. D, p.15). It also objected to imposition of mandatory costs without notice.

The State moved (App. D, p.18-23) to strike the Anders portion of counsel's initial brief, specifically because of the argument on the evidentiary issue as well as imposition of costs. Further, the State's motion raised the problem of dual representation, and the First District's policy of not allowing appointed counsel to withdraw. (See App. D, p.19-20). The challenged opinion (App. A, p.4) denied the State's motion and authorized Fennell to file a pro se initial brief.

SUMMARY OF ARGUMENT

Respondents seek the best of both worlds: to obtain court review of the record by filing an Anders brief, and to argue substantive issues under the guise of "referring to anything in the record that might arguably support the appeal".[6] By allowing substantive argument in nominal Anders briefs and authorizing pro se initial briefs on the same issues, the First District has exceeded the requirements of Anders and allowed unreasonable dual representation. The First District has abused its discretion. The resulting confusion and delay unfairly disadvantages the State's interest in prompt disposition of meritless appeals. The procedures followed in the consolidated cases are improper "special practice requirements"[7] that must be discontinued.

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[6] Anders, supra, 386 U.S. at 744, 18 L.Ed.2d 498.

[7] See In Re Order of First District Court of Appeals Regarding Brief Filed in Forrester v. State, 556 So.2d 1114, 1117-1118 (Fla. 1990) (disapproving procedures requiring discussion between appellate counsel, trial counsel, and defendant as "inflexible and intrusive") [hereinafter "In Re Forrester"].

ARGUMENT

ISSUE

WHETHER ARGUMENT ON THE MERITS PRECLUDES ANDERS REVIEW PROCEDURES IN CRIMINAL APPEALS

A. Abuse of Discretion

The three Respondents were adjudicated guilty; two after pleas, one after conviction. Each appointed counsel filed a brief, relying on Anders, to conclude that no meritorious arguments could be raised as to the issues considered "primary."

Not content to trigger the court's duty to independently review the record,[8] each counsel argued additional issues on the merits. Coupe complained that $454.00 in statutorily mandated costs were imposed without notice; and that a special probation condition, not included in the sentence as pronounced, was improperly shown in his sentence as written. (App. B, p.11). Williams argued that the 3-day delay between pronouncement and filing of his departure sentence reasons required resentencing under this Court's first opinion in Ree v. State.[9] (App. C, p.10). Fennell strongly argued that evidence of his past use of aliases was "improper" as evidence of prior crimes or for impeachment (App. D, p.14-15), as was imposition of court costs without notice (id., p.15).

Several errors in the opinion below become apparent. First, the Williams brief (arguing Ree) and Fennell brief (arguing

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[8] See Anders, 386 U.S. at 744: "[T]he court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." [e.s.]

[9] 14 F.L.W. 565 (Fla. November 16, 1989).

issues of evidence and costs) [10] did much more than "identify sentencing errors" (App. A, p.4). Therefore, these briefs should not have been accepted as invoking Anders review, even under the rationale of the challenged opinion.

Second and very important, the inclusion of substantive argument in the briefs unavoidably concedes that some "legal points [are] arguable on their merits". Anders, 386 U.S. at 744. See Penson v. Ohio, 488 U.S. ____, 109 S.Ct. ____, 102 L.Ed. 300 (1988) (discussing procedures required by Anders, and specifically noting that counsel and the reviewing court must independently find an appeal is wholly frivolous before the appeal may be considered on the merits without assistance of counsel). This alone should have precluded the First District from proceeding as required by Anders.

In McCoy v. Court of Appeals, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988), the court stated:

> Only after such an evaluation [of the case] has led counsel to the conclusion that the appeal is "wholly frivolous" is counsel justified in making a motion to withdraw. This is the central teaching of Anders. [e.s.]

486 U.S. at 438-9, 100 L.Ed.2d at 453. The court further explained that "wholly frivolous" means that the appeal "lacks any [e.s.] basis in law or fact". Id. at note 10.

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[10] In contrast to the First District's observation in footnote 1, the initial brief in Fennell does not expressly declare the evidentiary issue to be harmless error. At most, it implicitly concedes harmlessness by invoking Anders. Further, the State questions whether improper argument in an Anders brief can be obviated by such a concession.

Recent decisions by this Court echo the federal conclusion that no merit is a requisite for invoking Anders evaluation and review by the appellate court. Most notably, this Court has declared:

> If appellate counsel has already brought possible errors to the attention of the court, then there would be no need to file an *Anders* brief. The requirement in *Anders* of submitting a brief stating that the public defender has found no reversible error even worthy of good faith argument. . . . [e.s.]

State v. Causey, 503 So.2d 321, 322 (Fla. 1987). Moreover, the Causey opinion, upon answering the question certified, requires the district courts to obtain briefs when issues arguable on the merits are discovered. Obviously, such appeals are no longer wholly frivolous. Similarly, in discussing the roles of counsel and reviewing courts under Anders, this Court noted that counsel's responsibility to present argument and points justifying the appeal arises when counsel has previously found "no merit in the appeal". In Re Forrester, 556 So.2d at 1116.

The State's third point is premised upon two related observations. First, there is nothing in Anders, its federal progeny, or its interpretation by this Court that justifies the First District's allowance of "mixed" Anders briefs; even mixed briefs that present argument on issues relating only to sentencing.[11] Second, assume Respondents' briefs to the First District contained argument only as to sentencing issues. Unless it were willing to order supplemental briefs, the First District

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[11] Technically, this issue is before the court only as to Coupe and Williams, since Fennell explicitly argued the propriety of admitting evidence as to use of aliases.

would implicitly agree with the (equally implicit) conclusion by counsel that there were no arguable issues as to conviction or voluntariness of pleas. Anders procedures would not be in order. The court would not conduct an independent review of the record.

The First District would allow an appellant to argue sentencing issues on the merits, yet obtain independent court review of the record by invoking Anders as to conviction. The challenged opinion belies this idea. It declares (p.4) that arguments as to the sufficiency of departure reasons will be considered "so substantive" that Anders review would not be justified. The State does not dispute that conclusion. However, the exception will create more problems than it solves. If departure-sufficiency arguments preclude Anders review, what about arguments as to the sufficiency of proof as to statutory requisites for sentencing as an habitual felony offender? What about arguments as to specificity of the jury's finding that a firearm was used, in order to impose the minimum mandatory sentence?

It is not legally necessary to allow argument on the merits of "sentencing errors" in an Anders brief. If appellate counsel is ineffective for not raising preserved sentencing errors on direct appeal, there is a remedy through state habeas corpus proceedings. Smith v. State, 400 So.2d 956, 960 (Fla. 1981). Also, if the sentence is illegal, in excess of that allowed by law, improperly calculated, etc., there are remedies under Fla.R.Crim.P. 3.800 and 3.850.

The First District's allowance of argument on sentencing errors in an Anders brief conflicts with section 924.06(3), Florida Statutes. That statute provides:

> (3) A defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal. Such a defendant shall obtain review by means of collateral attack.

Coupe and Williams pled nolo contendere without reservation of issues. Consequently they waived appeal of matters arising before their pleas. Robinson v. State, 373 So.2d 898 (Fla. 1979) (construing the statute as "supporting a waiver of the right to review issues which arose from trial court rulings made prior to the entry of the plea"). That waiver is reinforced by the Anders declaration of no merit. Nevertheless, when directly appealed sentencing errors can accompany an Anders brief, the court is obligated to review the entire record to discern any arguable issues arising before, as well as after, the plea. In effect, the statutory waiver is nullified.

The statutory waiver need not be nullified. By rejecting so-called Anders briefs that include argument, the courts would be implicitly concluding that Anders procedures were not invoked. The duty to independently examine the record would not arise.

A prominent body of federal law - habeas corpus - categorically rejects "mixed" petitions. When a state prisoner seeks habeas relief through a petition containing a mixture of exhausted and non-exhausted claims, the entire petition dismissed. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The petitioner is not allowed to obtain

federal relief on grounds not fairly presented to state courts, thereby getting the benefit of error previously undeclared.

Analogously, Respondents seek to benefit from "undeclared error". They file nominal Anders briefs, then argue sentencing issues on the merits. The sentencing arguments claim error for purposes of compelling appellate review, yet such error remains undeclared for purposes of triggering Anders procedures.

When it denied the State's motions to strike, the First District abused its discretion. Equally important, the court set ill-advised precedent for continued misapplication of Anders.

B. Dual Representation

In all three cases, Respondents were authorized to submit pro se initial briefs. Their counsels had already submitted briefs containing argument on the merits. In effect, the court has authorized double-briefing on any issue. This is tantamount to dual representation, and is an abuse of discretion.

The abuse looms larger under the facts. In Williams, a pro se initial brief was authorized to be filed (App. C, p.25) even though the State had already answered the initial brief more than 2½ months earlier. When the pro se brief was not timely received,[12] the State moved to preclude its filing. (App. C, p.26-28). This motion was denied in the challenged order. Williams apparently still has authority to file a pro se initial

[12] As of September 5, 1990, pro se briefs had not been received in any of the three cases.

brief, 8 months after counsel's initial brief was served [January 11, 1990].

In Coupe, a pro se initial brief was authorized to be filed within 30 days of the court's order dated April 26, 1990. (App. B, p.18). When the brief was not received, the State moved [June 11] to preclude its filing. (App. B, p.20-23). The State's motion was denied in the challenged opinion. Apparently, Coupe still may file his own brief more than 4 months after counsel's initial brief was served [April 20, 1990].

Fennell's situation is different only because of its recency. The State moved [June 14, 1990] to strike the Anders portion of the initial brief prepared by counsel. (App. D, p.18-23) [served June 11, 1990]. The challenged order denied the State's motion and authorized a pro se initial brief, without specifying a deadline (App. A, p.4).

In sum, Respondents (in their "no merit" cases) are still authorized to file pro se initial briefs 3-8 months after their counsels served initial briefs. To the extent counsels' briefs argue on the merits, the First District has unreasonably authorized double-briefing. Williams is most troublesome, as the State has answered counsel's initial brief and will have to answer any pro se brief eventually filed.

Paradoxically, the First District has declared that "[T]he orderly progress of an appeal and the concomitant administration of justice will not be served by allowing corepresentation by a defendant who is represented by counsel." Whitfield v. State, 517 So.2d 23, 24 (Fla. 1st DCA 1987), rev. denied, 525 So.2d 881 (Fla. 1988).

Whitfield denied appellant's pro se motion to file a supplemental brief after counsel's initial brief stated that raising a particular issue would be "futile". Interestingly, counsel "made a professional determination that the issue appellant seeks to raise would be frivolous." Id. at 24. The court's observation employs the terminology of Anders.

There is no constitutional right of an accused to be represented by himself and counsel; the matter is within the court's discretion. State v. Tait, 387 So.2d 338 (Fla. 1980) (answering negatively the certified question of whether a criminal defendant has the absolute right to act as his own co-counsel under Art. I, §16, Fla.Const.). See United States v. Ziele, 734 F.2d 1447, 1454 (11th Cir. 1984), cert. denied sub. nom., Gustafson v. United States, 469 U.S. 1189, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985) (criminal defendant's right to self-representation does not give the right to "hybrid" representation partly by counsel and partly by defendant).

In Powell v. State, 206 So.2d 47 (Fla. 4th DCA 1968), the court first stated that dual representation on appeal is a matter within the court's discretion. Id. at 48. It then, however, denied the appellant's pro se motion for a copy of the appellee's brief and for time to file a reply (appellant had already filed a separate initial brief). The court premised this denial on the absence of prior court permission and the absence of a compelling reason for double-briefing. Id. Concluding, the court declared:

> To permit this [additional briefing] would clearly interfere with the time schedules and the filing and service of papers. Such practice would frustrate and confuse the

> appellate process and administration of justice. Id.

Here, the appellate process has been frustrated by allowance of doubling briefing tantamount to dual representation. Respondents have been granted an open-ended right to represent themselves, in addition to representation by counsel, in appeals largely conceded to be without merit. This is an abuse of discretion denying the State its right to prompt and expeditious disposition of meritless appeals. The challenged order must be vacated.

CONCLUSION AND SUGGESTION

Conclusion

The State demands that the certified question be answered in the negative. When Anders is invoked, no "secondary" issues may be argued on the merits. The State also demands that the First District's order be vacated, and the following relief granted:

A. As to Coupe - The State's April 26, 1990, motion to strike must be granted. The objectionable portion of counsel's initial brief must be stricken, and this case directed to proceed as a typical appeal.

B. As to Williams - The State's June 11, 1990, motion to preclude filing must be granted. This case must be directed to proceed on that partially-stricken brief, the State's answer, and a reply brief if timely submitted by Williams' counsel.

C. As to Fennell - The State's June 14, 1990, motion to strike must be granted. The Anders portion of counsel's initial brief must be stricken, and this case directed to proceed as a typical appeal.

Suggestion

While the State contends the First District erred in the challenged order, it agrees that "this problem is one which requires uniform treatment throughout this state." (App. A, p.4). However, the State suggests the better long-term remedy is not through the narrower confines of this decision, but through rulemaking. Just as this Court has specified uniform procedures

for appeals from summary denial of postconviction relief,[13] the State respectfully suggests that this Court initiate rulemaking to establish uniform procedures for district court response to Anders briefs. The State further suggests that such rule:

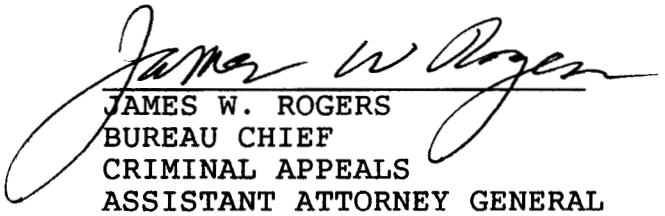
1. Prohibit "mixed" initial briefs. Legitimate sentencing problems can be corrected through motions under Rules 3.800 or 3.850.

2. Prohibit double briefing. When pro se initial briefs are authorized, such orders should specify necessary deadlines and who will be responsible for any reply brief. Further, the orders should state that the court, upon an appellant's failure to serve a pro se brief by the specified deadline, shall proceed to dispose of the appeal without such brief.

3. Prohibit dual representation. Direct that the appellate court review the record and pro se initial brief, and if no meritorious issues are discerned, direct that counsel withdraw. Should the pro se brief reveal an arguable issue, new appellate counsel can be appointed without the "conflict" of prior counsel's conclusion that no meritorious argument could be made.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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[13] See Fla.R.App.P. 9.140(g).

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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 Kathleen Stover, Assistant Public Defender and Michael Minerva, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, and to Nickolas G. Petersen, 32 Beal Parkway, S.W., Ft. Walton Beach, Florida 32548, this 7th day of September, 1990.

CHARLIE MCCOY
Assistant Attorney General

INDEX TO APPENDICES